

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1934

No. 6195

528

SPECIAL CALENDAR

THE UNITED STATES OF AMERICA EX REL. THE
KROGER GROCERY & BAKING COMPANY, A
CORPORATION, APPELLANT,

vs.

THE INTERSTATE COMMERCE COMMISSION,

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MARCH 30, 1934.

PRINTED APRIL 25, 1934.

Court of Appeals of the District of Columbia

JANUARY TERM, 1934

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KROGER GROCERY & BAKING COMPANY, A
CORPORATION, APPELLANT,

vs.

THE INTERSTATE COMMERCE COMMISSION,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 13, 1934.

Court of Appeals of the District of Columbia

No. 6195.

THE UNITED STATES OF AMERICA ex rel. THE KROGER
GROCERY & BAKING COMPANY, a Corporation, Appellant,
vs.

THE INTERSTATE COMMERCE COMMISSION.

a Supreme Court of the District of Columbia.

At Law.

No. 83358.

THE UNITED STATES OF AMERICA ex rel. THE KROGER
GROCERY & BAKING COMPANY, a Corporation, Relator,
vs.

THE INTERSTATE COMMERCE COMMISSION, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Amended Petition for Writ of Mandamus.*

Filed Dec. 15, 1933.

In the Supreme Court of the District of Columbia.

Law. No. 83358.

THE UNITED STATES OF AMERICA ex rel. THE KROGER
GROCERY & BAKING COMPANY, a Corporation, 35 East 7th
Street, Cincinnati, Ohio, Relator,

v.

THE INTERSTATE COMMERCE COMMISSION, Respondent.

To the Supreme Court of the District of Columbia, holding a District Court:

The relator respectfully shows unto this Court as follows:

I.

It is advised that this Honorable Court has original and exclusive jurisdiction in mandamus for and in respect of matters and things in this petition hereinafter set forth.

II.

That relator is an Ohio corporation with principal offices at Cincinnati, and, among other things was and is at all times herein mentioned engaged in packing and selling meat, and, in the course of such business it has shipped, over the rails of the carriers hereinafter referred to, to itself in Cincinnati, Ohio, numerous carloads of ordinary livestock from points in Illinois, Indiana, Iowa, Kentucky, Minnesota, Missouri, and Nebraska.

III.

(a) That the respondent, The Interstate Commerce Commission, is a body organized under and by virtue of an Act entitled "An Act to Regulate Commerce", approved February 4, 1887, (24 Stat. L. 379) and Acts amendatory thereof and supplementary thereto (25 Stat. L. 855; 26 Stat. L. 743; 28 Stat. L. 643; 34 Stat. L. 584; 34 Stat. L. 838; 35 Stat. L. 60; 35 Stat. L. 648; 36 Stat. L. 539; 37 Stat. L. 566; 37 Stat. L. 701; 38 Stat. L. 1196; 39 Stat. L. 441; 39 Stat. L. 538; 39 Stat. L. 619; 39 Stat. L. 922; 39 Stat. L. 951; 40 Stat. L. 101; 40 Stat. L. 270; 40 Stat. L. 272; 41 Stat. L. 456; et al.). That said respondent is an administrative, quasi-judicial tribunal which by said Act has heretofore been invested with certain powers, duties and authority in respect to the rates, regulations and practices of common carriers subject to said Act to Regulate Commerce, and payment of allowances and awards of damages to complainants for violation by carriers of provisions of said Act, as provided in Sections 13, 15, 15-A, 16 and others.

(b) That among other duties imposed upon the respondent herein, as provided in said Act, is that "The Commission is hereby authorized and required to execute and enforce the provisions of this Act". And

Section 6 of said Act among other things provides:

6 (1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as afore-

3 said, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

6 (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection there-

with, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariff.

Section 15 (5) of the Act also provides that:

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

4 (c) That said Act further provides:

Section 15 (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions

of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise, in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

And among other provisions of said Act there is a provision in Section 16 thereof as follows:

That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

IV.

(a) That as required by Section 6 of said Act, the Baltimore & Ohio Railroad Company, a common carrier subject to the provisions thereof, duly filed with respondent
5 a tariff entitled "Instructions Relative to Transportation of Live Stock and Live Poultry", said tariff being I. C. C. No. WL-9881. The said tariff, a certified copy of which is attached, as Exhibit A, and made a part

hereof, was the applicable tariff referred to and set forth in the report of the respondent.

(b) That pursuant to the requirements of Sections 6 and 15 (5) of said Act, it thereupon became the duty of said Baltimore & Ohio Railroad Company, and its agent, the Cincinnati Union Stock Yard Company, and any carrier concurring in said tariff, and its agent, The Cincinnati Union Stock Yard Company, to demand and collect only the charge or charges named in said tariff applicable to shipments of ordinary livestock, in carloads, made by relator to itself in Cincinnati, Ohio, from points in other States as above described, and not to demand or collect any charge not named in said tariff for delivery into suitable pens at Cincinnati of said shipments.

(c) That notwithstanding their duty not to demand or collect any charge not named in said tariff, The Baltimore & Ohio Railroad Company and other carriers concurring in said tariff and their agent, The Cincinnati Union Stock Yard Company, demanded and collected from relator on each and every carload shipment of ordinary livestock received at said Union Stock Yard an amount over and above and in addition to the charges named in said tariff, I. C. C. No. WL-9881. That said charges over and above the charges named in said tariff, I. C. C. No. WL-9881, were and are not contained in any tariff on file with respondent.

V.

6 (a) That heretofore, to-wit, on December 5, 1930, relator, being among the parties entitled so to do pursuant to Section 13 of the Act to Regulate Commerce, filed, pursuant to Rule II (b)(3) of respondents' Rules of Practice which provides that "Two or more complainants may join in one complaint if their respective causes of action are against the same defendant or defendants and involve substantially the same violation of the Act and a like state of facts", a complaint in the office of respondent against

The Baltimore & Ohio Railroad Company,
The Chesapeake and Ohio Railway Company,
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee),

The Erie Railroad Company,
Louisville and Nashville Railroad Company,
The Pennsylvania Railroad Company,
Southern Railway Company, and
The Cincinnati Union Stock Yards Company,

as defendants, said carrier defendants being common carriers between Cincinnati, Ohio, and points in other States and as such common carriers each was and is subject to the provisions of said Act to Regulate Commerce. The Cincinnati Union Stock Yards Company is and was at all times herein mentioned a corporation engaged in the operation of a public stockyard at Cincinnati, Ohio, which is the depot of the carrier defendants for receipt and delivery of livestock at said city, and as such The Cincinnati Union Stock Yards Company is and was subject to the provisions of said Act to Regulate Commerce in so far as it renders a service in connection with transportation of livestock, in carloads, in interstate commerce as therein described.

That said proceeding is Number 24091 on the docket of respondent.

(b) That in said complaint relator alleged that the charges collected on interstate shipments of ordinary livestock, in carloads, were illegal in violation of Section 6 of said Act in that certain charges, therein described, over, above, and in addition to the line-haul rates named in said tariff, I. C. C. No. WL-9881, were and are demanded, collected and retained by said defendants. That relator prayed that respondent issue an order requiring defendants to cease and desist from the alleged violations of said Act and to make reparation therefor on shipments moving during the statutory period and the pending of said proceeding.

(c) That on February 7, 1931, pursuant to authority from respondent, relator filed an amended complaint wherein it was alleged that the charges collected on interstate shipments of ordinary livestock, in carloads, were illegal in violation of Sections 6 and 15 (5) of said Act to Regulate Commerce in that certain charges, described therein, over, above, and in addition to the line-haul rates named in said applicable tariff, I. C. C. No. WL-9881, were and are demanded, collected and retained by said defendants. That relator prayed that respondent issue an order requiring de-

defendants to cease and desist from the alleged violations of said Act and to make reparation therefor on shipments moving during the statutory period and the pendency of said proceeding.

(d) That said defendants thereafter filed in the office of respondent answers substantially denying the allegations of said complaints and asking that they be dismissed.

(e) That in due course and in accordance with law a full and complete hearing was had upon the matters and things involved in said complaints and thereafter, as required by law, respondent on April 10, 1933, made, entered and filed a report in said proceeding, a true copy of which is attached hereto, marked Exhibit "B" and made part hereof, and by order dated April 10, 1933, mailed relator on May 22, 1933, respondent dismissed relator's complaint.

(f) That relator, upon receipt of said order dismissing its complaint, filed with respondent a petition for reconsideration and/or rehearing, wherein relator set forth its arguments with respect to its contentions as to respondent's erroneous and illegal application of the law, but, by order dated October 2, 1933, respondent denied relator's petition for reconsideration and/or rehearing. A true copy of said petition is attached hereto, marked Exhibit "C" and made part hereof.

VI.

(a) That said report of respondent sets forth the following conclusions of fact:

Tariff I. C. C. No. W. L. 9881 of the Baltimore and Ohio Railroad Company, participated in by the remaining defendant carriers, provides that its regular station for the handling of livestock at Cincinnati is the Cincinnati Union Stock Yards, a public stockyard located on its line at Stock Yards, Ohio, and within the Cincinnati switching district. Briefly stated, the Cincinnati Union Stock Yard Company, whose business consists of feeding, watering, yarding, weighing, handling, and caring for livestock, is employed as agent by defendant carriers to load and unload their livestock consignments at Cincinnati, to keep record thereof, to notify consignees of arrival of shipments, and to collect the freight charges.

The cars are placed on tracks adjacent to the unloading platform of the stockyard company and the waybills are delivered to it. The livestock is unloaded over a platform through chutes into so-called "unloading pens" which measure 688 square feet or twice the capacity of a 40-foot car. A few of these pens have facilities for watering, but not for feeding, livestock. In certain instances livestock has been taken direct from these unloading pens. The record does not show that these pens are not suitable for unloading purposes, and there is no contention that the way of egress is unfit. Most of the livestock comprising complainants' shipments are driven from the unloading pens to scales where the animals are hoof weighed and are then driven into so-called "holding pens", where
9 they are kept until consignees sign releases and remove them. These holding pens are equipped for watering and feeding the livestock. In certain instances the holding pens were not used, as the livestock was taken away by the consignees direct from the scales. Some of these holding pens are marked for the use of some of the complainants in the instant case in order that they may more readily locate their consignments. Shipments remain in these holding pens sometimes for several hours, occasionally overnight, and during holidays. If the livestock arrives late Saturday it is held over until Monday morning. After the livestock is hoof weighed it is not returned to the unloading pens. The stockyard employees perform all the work from the time the car doors are opened by them until the livestock is taken away by the consignees. No additional charge is made if the livestock is removed by consignees from the unloading pens before it is weighed, but when it is taken from the unloading pens, is weighed, and is placed in the holding pens, the yardage charges here assailed are made regardless of the length of time the holding pens are occupied. This charge is made also where consignees take possession of the livestock at the scales.

The tariff of the stockyard company naming these yardage charges is published in purported compliance with the packers and stockyards act, 1921, 42 Stat. 159, and is filed with the Secretary of Agriculture; it is not on file with us.

Prior to January 1, 1929, this tariff provided yardage charges of 15, 7.5, 5, and 4 cents per head, respectively, on cattle, calves, hogs, and sheep. On and after that date the respective charges of 30, 15, 10, and 8 cents per head have been made. These charges are intended to cover services rendered by the stockyard company in driving the livestock from the unloading pens to the holding pens, weighing, issuing a weight certificate, watering, and keeping the livestock in the holding pens for such time as may be desired by the consignees. There is no limit to the time consignments may remain in the holding pens without extra charge except for feed consumed.

(b) That respondent, notwithstanding the above-stated conclusions of fact and the requirements and provisions of said tariff, I. C. C. No. WL-9881, erroneously and without warrant of law dismissed relator's complaint upon an unwarranted, improper, and erroneous conclusion of law that "We find that the charges assailed are not subject to our jurisdiction".

(c) That respondent, in dismissing relator's complaint upon the erroneous conclusion that the charges as-
10 sailed were not subject to its jurisdiction, did so by placing on said tariff, I. C. C. No. WL-9881, and particularly Rule 16 (b) thereof, an erroneous, arbitrary and illegal interpretation in that respondent concluded that "Consideration of the various provisions of defendants' tariff relative to weighing leads to the conclusion that their contention (that it is optional with consignees whether they desire the freight charges based on the hoof weights obtained at destination or the track-scale weight of the cars) should be sustained". That the interpretation placed on said tariff by respondent is contrary to the well-established rules of law and contrary to the interpretation respondent has placed on like provisions of tariffs in numerous instances as shown in respondents' reports.

(d) That respondent, in dismissing relator's complaint upon the erroneous conclusion of law that the charges assailed were not subject to its jurisdiction, reached and based said erroneous conclusion upon the further erroneous conclusion of law in the interpretation of Section 15 (5) of said Act to Regulate Commerce by concluding, holding and finding that, pursuant to said Section 15 (5), "transportation

of ordinary livestock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards and that this marks the limit of our jurisdiction over such shipments”.

VII.

Your relator is advised that it is, as a matter of law, entitled to receive compensation from defendants named in the complaint in said proceeding No. 24091 for the charges illegally collected as described therein.

VIII.

11 Your relator is advised that respondent has exclusive jurisdiction in respect of numerous provisions of said Act to Regulate Commerce, and particularly with respect to the award of damages for a violation of said Act; and that respondent is charged with the duty of executing and enforcing the provisions of said Act; and that when specifically charged with such duty said respondent can exercise no discretion in respect thereto.

IX.

That relator has no appeal or review by way of appeal or otherwise from the decision of respondent in said proceeding No. 24091; that said Act to Regulate Commerce provides no remedy by which an order refusing to take jurisdiction of or grant affirmative relief in a complaint or petition before the respondent can be reviewed or reconsidered otherwise than by rehearing or reconsideration by respondent and relator having applied for reconsideration and rehearing and said application having been denied, it is without remedy to proceed in respect to the matters and things alleged in said complaint save only and excepting by application to this Honorable Court for mandamus to compel respondent to comply with the duties and obligations imposed on it by said Act to Regulate Commerce.

Wherefore, the premises considered, relator prays:

1. That this Honorable Court grant a rule directed to the respondent to show cause by a time limited in said rule why the respondent should not take jurisdiction of and grant affirmative relief in the matters and things alleged in the relator's complaint, being No. 24091 on the docket of said

respondent, and why it should not take jurisdiction of and act affirmatively on the claim of relator for an award of damages on account of illegal charges collected on
12 shipments of ordinary livestock, in carloads, which moved to Cincinnati, Ohio, from points in other States between December 5, 1927, to the present time, as described in said complaint, and to order reparation made therefor.

2. That this Honorable Court issue to respondent the peremptory writ of mandamus requiring and commanding said respondent to take jurisdiction of and grant affirmative relief, to-wit, the fixing of the amount of damages in the matters and things set forth in said complaint and to order reparation made therefor.

3. That this Honorable Court issue the peremptory writ of mandamus directed to the respondent commanding and directing respondent to execute and enforce said Act to Regulate Commerce, particularly Section 6 and the tariff issued and filed pursuant thereto, by giving proper and legal interpretation and effect to the provisions of said tariff, I. C. C. No. WL-9881, applicable to the shipments of livestock described in proceeding No. 24091, by finding and holding that under the provisions of said tariff, particularly Rule 16 (b) thereof, it was and is mandatory that all of said shipments of livestock be hoof weighed at Cincinnati, Ohio, and without additional charge for such weighing and service incidental thereto.

4. That this Honorable Court issue the peremptory writ of mandamus directed to respondent commanding and directing respondent to execute and enforce the provisions of said Act and particularly Section 15 (5) thereof, by requiring respondent to find and hold that the word "delivery" as used in said Section 15 (5) means and requires
strict compliance with the applicable tariff, I. C. C.
13 No. WL-9881, and a reasonable time and opportunity to accept such delivery of the livestock herein described.

5. That this Honorable Court issue the peremptory writ of mandamus directed to respondent commanding and directing respondent to execute and enforce said Act, and particularly by requiring respondent in proceeding No. 24091 to take jurisdiction thereof; to give legal effect to said tariff, I. C. C. No. WL-9881; to give legal effect to the requirements of Section 15 (5) of said Act, and to fix

the amount of damage sustained by relator by reason of the collection of illegal charges, said charges being over and above those named in the applicable tariff and said charges not being named in any tariff on file with respondent, on shipments of ordinary livestock, in carloads, as described in said complaint in said proceeding No. 24091 and to order reparation made therefor.

6. And for such other and further relief as this Honorable Court may deem relator is entitled to in the premises.

[SEAL.]

THE KROGER GROCERY &
BAKING COMPANY,

Relator,

By JOHN M. MARKLEY,

Assistant Secretary,

SAMUEL V. MARKLEY,

HARRY FRIEDMAN,

Attorneys for Relator.

STATE OF OHIO,

County of Hamilton, ss:

I, John M. Markley, certify that I am Assistant Secretary of The Kroger Grocery & Baking Company, the above-named relator, and have authority to verify the foregoing petition; that I have read the same and that the allegations

and facts therein are true to the best of my knowledge and belief.

14

JOHN M. MARKLEY.

Subscribed and sworn to before me this 11th day of December, 1933.

[SEAL.]

W. S. BLUME,

Notary Public,

Hamilton County, Ohio.

My commission expires June 30, 1935.

15

EXHIBIT "A".

Interstate Commerce Commission, Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedule hereto attached (consisting of twenty-eight photostat sheets) is a true copy of The Baltimore and Ohio Railroad

Company B. & O. R. R. Circular No. 640, I. C. C. No. WL-9881, said schedule having been filed with the said Interstate Commerce Commission on November 21, 1928.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 6th day of December, A. D., 1933.

[SEAL.]

GEORGE B. McGINTY,
*Secretary of the Interstate
Commerce Commission.*

(Here follows photolithographed page 16.)

26-30 Agents must thoroughly familiarize themselves with classification rules, and exceptions thereto and the additional instructions contained herein, relative to the handling and transportation of live stock, and to acquaint consignors, or their agents, with the requirements of these railroads before accepting live stock for transportation.

Rule 1—

Verbal shipping instructions will not be accepted, but shipping instructions must be given by shipper in writing to carrier's agent.

a—A Uniform Live Stock Contract must be issued for each and every shipment of live stock, whether in carloads or less carloads, including shipments of live stock forwarded with household effects or emigrant movables.

Should shipper elect not subscribe to conditions of the Uniform Live Stock Contract, additional charge will be made as provided in the governing tariff or classification.

b—Two Uniform Live Stock Contracts, which shall be identical, shall in all cases be prepared with pen and ink or indelible pencil, both contracts to bear the same signatures as called for by the form.

c—Unused blank spaces on the Uniform Live Stock Contract must be filled in with heavy lines in ink or indelible pencil.

d—Abbreviations of figures must not be used for the months, nor must initials be used for the names of shippers, consignees, destinations, etc., which must be written out in full.

e—When stock is destined for delivery at any particular stock yard, the full name of such stock yard should be inserted on Uniform Live Stock Contract and waybill.

REISSUE.

B. & O. R. R.—W. L.

I. C. C. No. WL-9881.
(Cancels I. C. C. No. WL-9585.)
C. R. C. No. WL-702.
(Cancels C. R. C. No. WL-664.)
I. R. C. No. WL-1320.
(Cancels I. R. C. No. WL-1207.)
Ohio No. WL-3110.
(Cancels Ohio No. WL-2871.)
Ill. C. C. No. WL-717.
(Cancels Ill. C. C. No. WL-636.)

V. R. R.

Agency Freight Tariff No. 1699.
(Cancels V. R. R. of Va. Agency Freight Tariff No. 1470.)
V. C. C. No. 438.
(Cancels V. C. C. No. 381.)

~~B. & O. R. R.~~

~~I. C. C. No. 21462.~~
(Cancels I. C. C. No. 20370.)

C. R. C. No. 2335.
(Cancels C. R. C. No. 2216.)

Ohio No. 5572.
(Cancels Ohio No. 5291.)

V. C. C. No. 431.
(Cancels V. C. C. No. 375.)

P. S. C. Md. No. 2165.
(Cancels P. S. C. Md. No. 1929.)

P. S. C. W. Va. No. 3357.
(Cancels P. S. C. W. Va. No. 2972.)

P. S. C. Pa. No. 2623.
(Cancels P. S. C. Pa. No. 2284.)

For additional cancellations, see page 3.

THE BALTIMORE AND OHIO RAILROAD COMPANY

DAYTON AND UNION RAILROAD COMPANY

NEW YORK DOCK RAILWAY

THE VALLEY RAILROAD COMPANY

IN CONNECTION WITH PARTICIPATING CARRIERS NAMED ON PAGES 4 TO

B. & O. R. R. CIRCULAR No. 640

(Willard, Ohio, exclusive, Neffs, Ohio, Parkersburg, W. Va., Kenova, W. Va., inclusive, and East.)
(Revised to December 27, 1928.)

B. & O. R. R. LOCAL AND JOINT FREIGHT TARIFF No. H-3267-B

(Cancels Tariff No. H-3267-C).
(Sandusky, Willard, Stewartsville, Belpre, Ohio, and West).

INSTRUCTIONS

Relative to the Transportation of Live Stock
and Live Poultry.

STAMP HERE

Issued NOVEMBER 21, 1928,

Effective DECEMBER 27, 1928.

RECEIVED
IN REGISTRATION
COMMISSION
58076 NOV 21 28
SECTION OF TARIFFS
11-10-190

B. & O. R. R. CIRCULAR No. 640

(Willard, Ohio, exclusive, Neffs, Ohio, Parkersburg, W. Va., Kenova, W. Va., inclusive, and East.)

(Revised to December 27, 1928.)

B. & O. R. R. LOCAL AND JOINT FREIGHT TARIFF No. H-3267-B

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INSTRUCTIONS

Relative to the Transportation of Live Stock
and Live Poultry.

Issued NOVEMBER 21, 1928,

Effective DECEMBER 27, 1928.

STAMP HERE

DATE RECEIVED

By
A. M. SCHUBERT,
Freight Tariff Agent,
Temple Bar Building,
Court & Main Streets,
Cincinnati, Ohio.

Correspondence

NOV 26 19 28

File No 11

By
W. H. FOGLE,
Chief of Tariff Bureau,
B. & O. Annex Building,
Liberty & Lombard Streets,
Baltimore, Md.

R. A. EBE,
General Live Stock Agent,
Baltimore, Md.

P. D. FREER,
General Freight Agent,
Cincinnati, Ohio.

GEO. S. HARLAN,
General Freight Agent,
Philadelphia, Pa.

JOHN H. CARROLL, JR.,
General Freight Agent,
Pittsburgh, Pa.

H. H. MARSH,
Genl. Freight Agent,
Wheeling, W. Va.

C. S. ROBERTS,
Genl. Freight Agent,
Baltimore, Md.

EDWARD HART, JR.,
Asst. Frt. Traffic Mgr.,
St. Louis, Mo.

GEO. M. KRIDLER,
Asst. Frt. Traffic Mgr.,
Chicago, Ill.

H. R. LEWIS,
Frt. Traffic Mgr.,
Cincinnati, Ohio.

GOLDER SHUMATE,
Genl. Frt. Traffic Mgr.,
Baltimore, Md.

O. S. LEWIS,
Frt. Traffic Mgr.,
Baltimore, Md.

SAMUEL HOUSE,
Asst. Frt. Traffic Mgr.,
Baltimore, Md.

W. F. RICHARDSON,
Freight Traffic Mgr.,
New York, N. Y.

STUART A. ALLEN,
Freight Traffic Mgr.,
Chicago, Ill.

W. H. F. {File 234317-3.
{Mailing List 537.

A. M. S. {File Tar. 859.
{M. O. 307.

(P. O. No. 65232.) 4000

f—When inserting weight of shipment on the Uniform Live Stock Contract, where actual weight is less than the minimum weight, agents must exercise care to use the minimum weight provided by governing tariff or classification.

g—Kind of live stock and number of head must be shown on the Uniform Live Stock Contract.

h—If any charges are advanced, it is of the utmost importance that the amount of such charges and what they represent be inserted on the face of the Uniform Live Stock Contract in the space provided therefor. Any loss to the Company by failure to comply with this rule will be charged to the employe at fault.

i—The numbers and initials of the car or cars into which shipments are loaded must invariably be inserted on the face of the Uniform Live Stock Contract.

j—The shipper, or his agent, must affix their signatures in full in the space provided therefor on the Uniform Live Stock Contract. (When shipper's agent signs the contract, he must sign both the shipper's name and his own in full.)

k—Party or parties in charge of live stock must also sign their names in full to the release given on the reverse side of the Uniform Live Stock Contract, which signature or signatures must be witnessed by the station agent, or his representative.

l—The attendant in charge of live stock must affix his signature on the back of the Uniform Live Stock Contract whenever requested so to do by the conductor in charge of the train. This for identification purposes.

m—The Uniform Live Stock Contract provides for the signature of a witness to same. When it is found impossible to procure the signature of a witness, this requirement may be waived.

n—Particular attention is called to the clause in the Uniform Live Stock Contract providing that no claim for loss or damage will be recognized, allowed, or paid by these carriers, unless claim is made in writing and verified by affidavit of the shipper, consignee, or their agent, and filed with the Freight Claim Agent, B. & O. R. R., Baltimore, Md., on shipments delivered at stations on the B. & O. R. R. within four (4) months after the stock has been removed from car or cars.

o—The original and duplicate Uniform Live Stock Contracts must be disposed of according to the following:

When originating at points on the B. & O. R. R., D. & U. R. R., and V. R. R. (see Rule 27-a, page 23):

One of the Uniform Live Stock Contracts will be given to the attendant accompanying the stock, and is to be surrendered by him to the Agent at destination upon delivery of the shipment. If no one accompanies the stock, the Uniform Live Stock Contract will be given to the shipper, who should forward same to the consignee, to be surrendered to the agent at destination upon delivery of the shipment.

The other Uniform Live Stock Contract should, in all particulars, agree with the one given attendant accompanying the stock or shipper, and have inserted thereon the number and date of the waybill or waybills covering shipment, and should be filed with station records, to which should be attached the agent's record as to condition of the car or cars in which shipment is forwarded (see Rule 10, page 14).

31 Rule 14—Concluded.

j—Concluded.

(5) Should it develop that free transportation has been secured by reason of any misrepresentation on the part of either the owner or employe who accompanies the stock, the owner shall forfeit to the carrier double the regular first class passenger fare between the points traveled by the attendant accompanying the stock.

(6) None but male adult caretakers will be permitted to accompany shipments of live stock.

(7) The attendant must ride on the same train on which the stock is transported.

(8) Attendant or attendants will be provided with regular live stock contract by the carrier's agent at shipping point, which, when properly executed, will be accepted by the conductor of the train on which the stock is handled as authority for the free transportation of such attendant or attendants. Conductors in charge of train on which the stock is transported will certify in the space provided on the live stock contract for such certification, that such attendant or attendants actually accompanied the stock between the points where the stock was handled on his train.

(9) When provision is made for free return transportation of attendants in charge, the live stock contract, certified to by the conductors as above provided, must be presented by the attendant or attendants to the carrier's agent at destination within seventy-two (72) hours (exclusive of Sundays and legal holidays) after the arrival of the stock, in the case of cattle, hogs, sheep or goats, and within fifteen (15) days (exclusive of Sundays and legal holidays) after arrival of the stock in the case of horses or mules.

(10) Should attendant desire to accompany the shipment only to an intermediate point short of final destination, the return transportation may be granted as above provided, upon surrender of the live stock contract to the carrier's agent at such intermediate point.

(11) With shipments of live stock, less than carloads, shippers may, at their option and expense, furnish a male adult attendant who, upon paying full fare, shall be permitted to accompany such shipments.

k—Man in charge of carload shipments of live poultry will be carried free; no free return passage will be given.

Rule 15—

There are regularly established stock yards and weighing bureaus, or regularly licensed weighers at the following points on B. & O. R. R.

Baltimore, Md. (Claremont, Md.), Union Stock Yards.

Chicago, Ill., Union Stock Yards.

Cincinnati, Ohio, Union Stock Yards.

Cleveland, Ohio, Union Stock Yards.

Columbus, Ohio, Central Ohio Live Stock Co-Operative Association.

Dayton, Ohio, Union Stock Yards.

East St. Louis, Ill., National Stock Yards.

Fostoria, Ohio, Union Stock Yards.

Indianapolis, Ind., Union Stock Yards.

Jersey City, N. J., Central Union Stock Yards.

Louisville, Ky., Bourbon Stock Yards.

Pittsburgh, Pa., Pittsburgh Union Stock Yards (Herr's Island, Pa.).

Toledo, Ohio, Union Stock Yards; Interstate Stock Yards.

Washington, D. C., Union Stock Yards (Benning, D. C.).
 Wheeling, W. Va., Union Stock Yards.

Rule 16—

Hoof Weights and Shrinkage Allowances.

a—In no case will the charges be collected on less than the established carload minimum weight.

b—Where proper facilities are provided at destination for obtaining hoof weights, the weights so obtained after the stock has been fed and watered, will be the proper basis for assessing freight charges, with the following fill allowances:

Calves	No deduction.
Cattle, carloads, en route 12 hours or less	500 pounds.
Cattle, carloads, en route over 12 hours	800 pounds.
Hogs, single deck cars	300 pounds.
Hogs, double deck cars	600 pounds.
Sheep and goats	No deduction.

If stock has not been fed and watered, destination hoof weight will be used without deduction for fill.

c—Where actual weight is applied on mixed shipments, the fill allowances shall be based on the species of stock which set the rate under the minimum rule in Rule 30-g, page 26.

d—When two or more carloads of the same kind of live stock are offered for shipment by one owner on the same day, from the same station, destined to a market point at which the hoof weight is the basis for assessing freight charges, the aggregate weight of the shipment will be divided between the number of cars in the shipment, subject to the established carload minimum weight. In event more than one kind of live stock is so shipped, each class shall be dealt with separately. Cattle weights cannot be added to hog weight, nor sheep and goat weights to either of the others.

e—All weights furnished at market points (see Rule 15, page 16), will be subject to verification by the carriers.

32 & 33 Rule 16—Concluded.

f—(1) Where arrangements are not made at destination for the use of certified hoof selling weights as a basis for determining freight charges, or

(2) Where shipments move between stations (not markets) upon which actual weights are not obtainable, then

(3) The track scale weights of cars loaded and empty will be used to determine freight charges.

(4) Corrections, however, will be made from track scale weight to the certified hoof selling weight when supplied by consignee, if such weight is greater than the net track scale weight by more than 500 pounds per car. (See Paragraph "a".)

g—(1) On carloads shipments of live stock forwarded from market points (see Rule 15, page 16), to points not markets, the hoof selling weight obtained after the stock has been fed and watered will be supplied by shipper and used as basis for collection of freight charges.

(2) The following allowances for fill on live stock will be deducted from the hoof selling weights before waybilling:

Cattle.....	500 pounds per car.
Hogs, single deck.....	300 pounds per car.
Hogs, double deck.....	600 pounds per car.
Sheep and goats....	No deduction. (See Paragraph "a.")

(3) In the event of the hoof selling weights cannot be obtained the carrier must track scale the car empty and loaded and used weights so ascertained for the collection of freight charges.

NOTE.—The term "hoof weights" as used herein signifies "hoof selling weights" whenever "hoof selling weights" are obtained.

h—When weights under the foregoing rules cannot be obtained at origin or destination shipment will be subject to Paragraph "a."

34 Rule 21—

It is important that waybills and expense bills give full and explicit information as to just what the advance charges cover. As an example, assume that a shipment made from East St. Louis, Ill., to New York, N. Y., is bedded at East St. Louis and charge made therefor, it is also stopped for feeding at Belpre, Ohio, or some other point and a charge made therefor. Waybills must itemize these charges, so

that agent at destination may make out an expense bill, giving consignee full information.

Rule 22—

a—Agents at points where shipments of live stock are stopped for feed, water and rest, must make supplementary revenue waybill for the yardage, feeding or bedding charges incurred at their station, attaching same to the regular revenue waybill; also endorsing on the regular revenue waybill the name of their station, number and date of yardage, feeding or bedding waybill; the amount of yardage, feeding or bedding and the time and date shipment is reloaded after the stock has been fed and watered.

b—Yardage, feeding or bedding charges must be shown as advance charges on the supplementary waybill and report made by the billing agent, of the amount on his "Miscellaneous" collection report, B. & O. R. R. Form 29, under proper heading. See Accounting Department Circular No. 583, supplements thereto and successive issues thereof.

Agents at destination will carefully check the endorsements on the regular revenue waybills against the supplementary waybills attached.

When waybill bears notation covering yardage, feeding or bedding charges for which no supplementary waybill is attached, collection must include such charges, and the agent at point where charge was made must be immediately asked for copy of supplementary revenue waybill covering such charges.

Rule 23—

Live Stock, Loading at Point of Origin, and Unloading at Destination.

a (1)—Ordinary Live Stock, Loading of at Point of Origin. Ordinary Live Stock, as defined in Section "f" herein, in carloads, tendered for shipment from Public Stock Yards (as defined in Section "h") located at points shown in Section "i" herein, will be loaded from suitable pens, as described in Section "g" herein, at such Stock Yards, by the carrier, without extra charge to the shipper, consignee or owner, for the loading service.

(2)—Ordinary Live Stock, Unloading of at Destination. Ordinary Live Stock, as defined in Section "f" herein, in carloads, destined to Public Stock Yards (as defined in Section "h") located at points shown in Section "i" herein, will be unloaded into suitable pens, as described in Section "g" herein, at such Stock Yards, by the carrier, without extra charge to the shipper, consignee or owner, for the unloading service.

(3) On other than Ordinary Live Stock, loaded from, or unloaded into, Railroad Operated Stock Yards, and the carriers perform the service, a charge of fifty (50) cents per car will be made for the loading, and a charge of fifty (50) cents per car for the unloading services, such charge to be assessed against the property.

(4)—On other than Ordinary Live Stock, loaded from or unloaded into Public Stock Yards, the actual charges assessed by such Public Stock Yards Companies will be assessed against the property.

(5)—In applying the charges provided for herein to a consignment handled under the provision of Rule 8, the charges will be for the cars ordered.

Charges.	
Ordinary Live Stock. (See Section "f").	Other Than Ordinary Live Stock.
b. Stops in Transit at Railroad Operated Stock Yards. (1) Except as otherwise indicated herein, when live stock in transit is stopped enroute at railroad operated stock yards for feed, water and rest, in compliance with Federal or State Laws (the carrier furnishing the feed and performing the service), the charge for the service of unloading, feeding, watering and reloading the stock will be (2) Where stop is made at the request of shipper, consignee or owner, or for the purpose of trying an intermediate market, or to comply with quarantine regulations (3) When shipments of hogs are fed and watered without unloading from car, the service charge for feeding and watering will be (4) When shipments of live stock are given more than one feed at the same station, and carrier furnishes the feed and performs the service, the charge will be	No charge for unloading or reloading from suitable pens, defined in Section "g". Charge for service of feeding and watering, 50 cents per car. (See Paragraph 4). The cost to the carrier of the feed furnished as provided in Section "d" will be added to the service charges 50 cents per car for unloading and 50 cents per car for reloading will be assessed against shipments. The cost to the carrier of the feed furnished as provided in Section "d" will be added to the service charges 50 cents per car. The cost to the carrier of the feed furnished as provided in Section "d" will be added to the service charges Service charge of 25 cents for each additional 100 pounds of hay or mixed feed, or each additional bushel of grain, which will be in addition to the cost to the carrier of the feed

c. Stops in Transit at Other than Railroad Operated Stock Yards. When live stock in transit is stopped en route at other than railroad operated stock yards for feed, water and rest, in compliance with Federal or State Laws, the charge will be.....	Actual charge of Stock Yards Company, except that carrier will assume charges for unloading and reloading*.....	Actual charge made by the Stock Yards Company for the unloading, feeding, watering, reloading and other services rendered. ¶
When the stop is made at the request of the shipper, consignee or owner, or for the purpose of trying an intermediate market, or to comply with quarantine regulations, the charge will be.....	Actual charges made by the Stock Yards Company for unloading, feeding, watering, reloading and other services rendered, will be assessed against the property and may be paid by the attendant in charge, or if not so paid, must be entered on waybill as "Feed and Service Charges."	Actual charges made by the Stock Yards Company for unloading, feeding, watering, reloading and other services rendered, will be assessed against the property and may be paid by the attendant in charge, or if not so paid, must be entered on waybill as "Feed and Service Charges."

* The charges of Stock Yards Company for the feed and services rendered (other than unloading and reloading) will be assessed against the property and may be paid by the attendant in charge, or if not so paid, must be entered on the waybill as "Feed and Service (other than unloading and reloading) Charges."

¶ Will be assessed against the property and may be paid by the attendant in charge, or if not so paid, must be entered on waybill as "Feed and Service Charges."

d. (6) Feeding and Watering of Live Stock in Transit, Less Carloads.

A charge of 25 cents per head will be made for service of feeding and watering live stock, less carloads, in transit, with maximum charge of 50 cents for each shipment in any one car each time the stock is fed and/or watered, such service charge to be added to the charge covering the cost to the carrier of the feed furnished. (R. A. 32866.)

e. Quantity and Kind of Feed to be Used.

Live stock stopped in accordance with paragraph "c" hereof, that has been in transit 36 hours or less, shall be fed in accordance with instructions, if any, from owner or attendants in charge, but in the absence of such instructions, or regardless of instructions, the feed shall be equivalent to the minimum requirements prescribed by the U. S. Department of Agriculture (see General Superintendent Transportation Live Stock Circular No. 2-A Revised, of June 1, 1921, supplements thereto and successive issues thereof).

f. Notations on Waybills.

Agent at feeding station must note on waybills amount of each kind of feed furnished and the amount charged for each, together with the amount of service charge, and must state whether or not paid by attendant in charge; if not paid by attendant in charge, must be entered on waybill as "Feed and Service Charges."

g. Definition of Ordinary Live Stock.

The description "Ordinary Live Stock" includes all Cattle (bulls, calves, cows, oxen or steers); Swine (boars, pigs or sows); Sheep (ewes, lambs or rams); Goats (including kids); Horses (colts, geldings, mares or stallions, including ponies) or Mules, except such as are chiefly valuable for breeding, racing, show purposes or other special uses.

h. Definition of Term "Suitable Pens."

The term "Suitable Pens" is understood to mean the pens into or from which ordinary stock is loaded, unloaded or reloaded directly from or to the car.

i. Definition of Public Stock Yards.

Public Stock Yards, as referred to in this item, are stock yards where trading in live stock is carried on; where yarding, feeding and watering facilities are provided by the stock yard, or similar company, and where Federal inspection is maintained for the inspection of live stock for communicable diseases.

j. Points at Which Public Stock Yards Are Located.

Baltimore, Md., Union Stock Yards (Claremont).
Belpre, Ohio, Belpre Stock Yards.
Chicago, Ill., Union Stock Yards.
Cincinnati, Ohio, Cincinnati Union Stock Yards.
Cleveland, Ohio, Cleveland Union Stock Yards.
Columbus, Ohio, The Drovers' Union Stock Yards.
Connellsville, Pa., Connellsville Stock Yards.
Dayton, Ohio, Dayton Union Stock Yards.
East St. Louis, Ill., Guiton & Harrington Mule Co. Yards.
East St. Louis, Ill., National Stock Yards.
Fostoria, Ohio, Fostoria Union Stock Yards.
Indianapolis, Ind., Indianapolis Union Stock Yards.
Louisville, Ky., Bourbon Stock Yards.
Louisville, Ky., K. & I. Stock Yards.
Pittsburgh, Pa., Pittsburgh Union Stock Yards (Herr's Island).
Springfield, Ill., Springfield Stock Yards Company.
Toledo, Ohio, Toledo Union Stock Yards.
Washington, D. C. Union Stock Yards (Benning).
Wheeling, W. Va., Wheeling Union Stock Yards.

36 & 37 Live Stock, Loading of at Point of Origin, and Unloading at Destination—Concluded.

k. Live Stock Stopped in Transit for Inspection of Bureau of Animal Industry.

The charges for switching, unloading and loading live stock which is stopped in transit for inspection by representatives of the Bureau of Animal Industry of the United States Government will be assessed against the shipment and will not be absorbed.

Charge for Removal and Replacing Partitions for Live Stock Shipments.

l—These companies shall not be held liable on account of any loss or injury to stock caused by any alleged insufficiency in or defective condition of partitions. Such partitions must be placed in cars by shippers at their own risk and expense.

m—When it becomes necessary to remove and replace partitions in cars loaded with live stock, stopped in transit to feed, water or rest, at feeding stations operated by the carriers, the following charges will be made to cover the operation of removing and rebuilding (not including material used) partitions:

1—Small partitions (such as extended across corner of car), 50 cents each.

2—Larger partitions (such as extended across width of car), \$1.00 each.

These charges will be assessed against the property in addition to the transportation charges.

When the service covered by this item is not performed by the carriers, the actual charges of the party performing such service will be in addition to the transportation charges.

n—Feed placed in cars by shippers for the purpose of feeding live stock in such cars, while in transit, will be transported free. Any excess feed removed from the cars or remaining in the possession of consignee for his use after arrival at destination will be charged for at less car-load rate from point of origin to destination and charges collected by agent at destination.

38 & 39 Rule 24—Concluded.

Miscellaneous Deliveries—Concluded.

9. Cincinnati, Ohio.

The regular station of the B. & O. R. R. for the handling of all classes of live stock at Cincinnati is the Cincinnati Union Stock Yards, at Stock Yards, Ohio, the B. & O. R. R. not having proper facilities at any other point in the Cincinnati District for the loading, unloading and yarding of live stock, but if it is desired that shipments of Horses or Mules

be handled over the Wood Street Platform, at Cincinnati, special arrangements may be made as follows:

a—Outbound. Shippers must make all necessary arrangements as to placing of cars, etc., with local agent at Cincinnati, and stock should not be brought to the platform until it is known that the cars are placed for loading and other details arranged.

b—Inbound. If Wood Street delivery is desired, parties interested must agree to unload and take care of the stock immediately upon cars being placed at Wood Street Platform. In the event the consignees or their representatives are not on hand to take care of the shipment upon arrival, this Company will switch the cars to stock yards, where the stock will be unloaded and cared for and the additional expense for switching and Stock Yards Company expense for handling will be charged in addition to the freight charges assessed to Wood Street. In accepting shipments for Wood Street Yard delivery, agents must insert the following notation on the Live Stock Contract executed by shippers:

NOTE.—“Agents must show on billing actual deliveries requested by shippers, and if, upon the arrival of the stock at such destination, a further movement is desired, the expense incurred by such movement must be borne by shippers or consignees.”

“Wood Street Yard delivery will only be made when convenient to the Railroad Company and consignees must unload shipments immediately upon arrival; otherwise shipments will be taken to Cincinnati Union Stock Yards, Stock Yards, Ohio, at shipper's or consignee's expense.”

Shipments of Cattle, Calves, Sheep or Hogs, in straight or mixed carloads can only be handled (either inbound or outbound) at Cincinnati Union Stock Yards, Stock Yards, Ohio.

Rule 30

Minimum Weights.

	Calves.			
	For Cars. (See Note 1.)			
			Cattle.	
36 feet 7 inches and under in length.....			22,000 pounds	S. D. D. D.
Over 36 feet 7 inches to and including 40 feet 6 inches in length.....			24,000 pounds	16,000 pounds 24,000 pounds
Over 40 feet 6 inches in length.....			26,000 pounds	17,000 pounds 25,000 pounds
				18,000 pounds 26,000 pounds

	Hogs.			
	For Cars. (See Note 1.)			
			S. D. D. D.	
36 feet 7 inches and under in length.....	17,000 pounds	23,000 pounds		
	(See Notes 2 and 3)	(See Notes 2 and 3)		
Over 36 feet 7 inches to and including 40 feet in length.....	18,000 pounds	24,000 pounds		
	(See Notes 2 and 3)	(See Notes 2 and 3)		
Over 40 feet to and including 40 feet 6 inches in length.....	18,000 pounds	24,000 pounds		
	(See Notes 2 and 3)	(See Notes 2 and 3)		
Over 40 feet 6 inches in length.....	19,000 pounds	25,000 pounds		
	(See Notes 2 and 3)	(See Notes 2 and 3)		

	Goats.			
	For Cars. (See Note 1.)			
			S. D. D. D.	
36 feet 7 inches and under in length.....	12,000 pounds	18,000 pounds		
Over 36 feet 7 inches to and including 40 feet in length.....	13,000 pounds	19,000 pounds		
Over 40 feet to and including 40 feet 6 inches in length.....	13,000 pounds	20,000 pounds		
Over 40 feet 6 inches in length.....	14,000 pounds	20,000 pounds		

	Sheep.			
	For Cars. (See Note 1.)			
			S. D. D. D.	
36 feet 7 inches in length and under.....	12,000 pounds	(2)		
		(3)		
Over 36 feet 7 inches to and including 40 feet in length.....	13,000 pounds	(2)		
		(3)		
Over 40 feet to and including 40 feet 6 inches in length.....	13,000 pounds	(2)		
		(3)		
Over 40 feet 6 inches in length.....	14,000 pounds	(2)		
		(3)		

Rule 31—Weighing Live Stock Moving Between Country Points.

Live stock, carloads, moving between points not provided with facilities for weighing, the shipper or consignee shall furnish actual weights and certify to their correctness. Agent will accept and bill at weights so obtained, subject to the minimum weight provided for the size of car ordered. If shipper at point of origin or consignee at designation can not furnish weights, freight charges will be assessed on basis of minimum weight for the size of car ordered, provided shipment could

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EXHIBIT "B".

Interstate Commerce Commission.

No. 24091.¹

E. KAHN'S SONS COMPANY et al.

v.

BALTIMORE & OHIO RAILROAD COMPANY et al.

Submitted January 25, 1933. Decided April 10, 1933.

So-called yardage charges collected on ordinary livestock at the public stockyard in Cincinnati, Ohio, by the Cincinnati Union Stock Yard Company, found not subject to the jurisdiction of the Commission. Complaints dismissed.

Karl Knox Gartner, George E. Elliott, and T. J. McLaughlin for complainants.

Herbert S. Harr, O. J. Norris, L. P. Day, Albert Conner, Murray Seasingood, and Clyde M. Abbott for defendants.

Ernest L. German for intervener.

Report of the Commission.

By the COMMISSION:

Exceptions were filed by defendants to the report proposed by the examiners, and the title case was orally argued. Our conclusions differ from those recommended by the examiners.

Complainants in the title case,² corporations, allege by complaint filed December 5, 1930, as amended, that certain yardage charges collected on ordinary livestock at Cincinnati, Ohio, were in violation of section 6 of the Interstate Commerce Act. Reparation only is sought. The Southeastern Live Stock Association intervened but offered no

¹ This report also embraces No. 25660, *Jacob Bauer's Sons et al. v. Same.*

² E. Kahn's Sons Company, Kroger Grocery & Baking Company, H. H. Meyer Packing Company, A. Sander Packing Company, and J. & F. Schroth Packing Company.

evidence. In No. 25660, complainants³ by complaint filed November 11, 1932, make the same allegations and seek the same relief as in the title case. In addition they also allege a violation of section 15 (5) of the act. No hearing was held in No. 25660, but the parties have indicated willingness to have this case decided on the record made in the title case.

Tariff I. C. C. No. W. L. 9881 of the Baltimore and Ohio Railroad Company, participated in by the remaining defendant carriers, provides that its regular station for the handling of livestock at Cincinnati is the Cincinnati
45 Union Stock Yards, a public stockyard located on its line at Stock Yards, Ohio, and within the Cincinnati switching district. Briefly stated, the Cincinnati Union Stock Yard Company, whose business consists of feeding, watering, yarding, weighing, handling, and caring for livestock, is employed as agent by defendant carriers to load and unload their livestock consignments at Cincinnati, to keep record thereof, to notify consignees of arrival of shipments, and to collect the freight charges.

The cars are placed on tracks adjacent to the unloading platform of the stockyard company and the waybills are delivered to it. The livestock is unloaded over a platform through chutes into so-called "unloading pens" which measure 688 square feet or twice the capacity of a 40-foot car. A few of these pens have facilities for watering, but not for feeding, livestock. In certain instances livestock has been taken direct from these unloading pens. The record does not show that these pens are not suitable for unloading purposes, and there is no contention that the way of egress is unfit. Most of the livestock comprising complainants' shipments are driven from the unloading pens to scales where the animals are hoof weighed and are then driven into so-called "holding pens", where they are kept until consignees sign releases and remove them. These holding pens are equipped for watering and feeding the livestock. In certain instances the holding pens were not used, as the livestock was taken away by the consignees direct from the scales. Some of these holding pens are

³ Milton Bauer and Austin Bauer, trading as Jacob Bauer's Sons; the John B. Ireton Company, a corporation; Gustave Juengling, Sr., trading as Gus Juengling & Son; and John Rehn, Henry Rehn, Arthur Rehn, and Albert Rehn, trading as Wm. G. Rehn's Sons.

marked for the use of some of the complainants in the instant case in order that they may more readily locate their consignments. Shipments remain in these holding pens sometimes for several hours, occasionally overnight, and during holidays. If the livestock arrives late Saturday it is held over until Monday morning. After the livestock is hoof weighed it is not returned to the unloading pens. The stockyard employees perform all the work from the time the car doors are opened by them until the livestock is taken away by the consignees. No additional charge is made if the livestock is removed by consignees from the unloading pens before it is weighed, but when it is taken from the unloading pens, is weighed, and is placed in the holding pens, the yardage charges here assailed are made regardless of the length of time the holding pens are occupied. This charge is made also where consignees take possession of the livestock at the scales.

The tariff of the stockyard company naming these yardage charges is published in purported compliance with the packers and stockyards act, 1921, 42 Stat. 159, and is filed with the Secretary of Agriculture; it is not on file with us.

46 Prior to January 1, 1929, this tariff provided yardage charges of 15, 7.5, 5, and 4 cents per head, respectively, on cattle, calves, hogs, and sheep. On and after that date the respective charges of 30, 15, 10, and 8 cents per head have been made. These charges are intended to cover services rendered by the stockyard company in driving the livestock from the unloading pens to the holding pens, weighing, issuing a weight certificate, watering, and keeping the livestock in the holding pens for such time as may be desired by the consignees. There is no limit to the time consignments may remain in the holding pens without extra charge except for feed consumed.

The stockyard company challenges our jurisdiction. It contends that transportation within the purview of the Interstate Commerce Act of carload shipments of ordinary livestock ends when the animals are placed in the unloading pens, and that the services and use of facilities for which the yardage charges are made are not connected with transportation but are stockyard services as defined in the Packers and Stockyards Act, 1921, and are subject to the jurisdiction of the Secretary of Agriculture. It refers to section 201 (b) of that act which provides that the term

“stockyard services” means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock.

The stockyard company further contends that it is not a common carrier, and that a non-common-carrier agent performing a terminal service for a common carrier is not required to file tariffs with us, citing *Tariffs Embracing Motor Trucks or Wagon Transfer Service*, 91 I. C. C. 539. Reference is also made to *Atchison, T. & S. F. Ry. Co. v. Kansas City Stock Yards Co.*, 33 I. C. C. 92, wherein we found that the Kansas City Stock Yards Company was not a common carrier engaged in interstate commerce and therefore not subject to our jurisdiction.

Complainants are of the view that our jurisdiction over transportation extends to the actual delivery to the consignee designated in the contract of carriage which they say takes place after the livestock is weighed and placed in the holding pens, and not at the unloading pens, and that the services and facilities covered by the charges assailed are no more than the carriers are required by law to furnish or to perform in order to complete the transportation contract. They refer to section 16 (7) and (8) of the Interstate Commerce Act to support their thought that as the stockyard company is an agent of the carriers for the performance of delivery service it becomes a proper party in

47 a proceeding before us even though it is an independent contractor. Section 16 (7) provides that it shall be the duty of every common carrier, its agents and employees, to observe and comply with our orders so long as the same shall remain in effect. Paragraph 8 makes it a penal offense, punishable by fine, for any such common carrier, agent, or employee to fail to obey such an order made under the provisions of sections 3, 13, and 15 of the act.

Reference is made to several of our findings and to holdings of the courts in which is recognized the fact that railroads are not required to own all the instrumentalities necessary to perform the services which they are bound to render, and that they may lease or hire suitable facilities or discharge part of their duties through agents. Complainants rely particularly on *Allied Packers v. Atchison*,

T. & S. F. Ry. Co., 161 I. C. C. 641, wherein we passed upon the legality and reasonableness of certain charges insofar as they were made for the use of stockyard facilities in effecting delivery of interstate shipments. In that case the charges assailed, labeled storage charges, covered the service of furnishing the chutes, pens, driveways, and runways necessary to receive the livestock at the unloading point and take it from that point out of the stockyard. We there found that the charges assailed, insofar as they were collected for the use of the stockyard facilities in effecting delivery, were charges for transportation. The stockyards there considered were owned and operated by the New York Central Railroad Company, and the charges were made even when the employees of the complainants in that case were waiting and ready to receive the livestock at the time of its arrival and unloading from the cars, and when the unloading and driving of the livestock through the stockyard was so far as practicable one continuous movement and transaction. The stockyard company considered in the instant case is not owned by the carriers, and no additional charge is made when delivery is taken from the unloading pens.

Complainants believe that under certain provisions of the tariff before mentioned their shipments must be hoof weighed at destination before delivery can be made, and that this weighing is part of the transportation service for which no additional charge can be made. Defendants' position is that it is optional with the consignees whether they desire the freight charges based on the hoof weights obtained at destination or the track-scale weights of the cars, and that it is mandatory to base freight charges on the hoof weights only in instances where that information is obtained, it being of no concern to them whether the stockyard company or the consignee bears the cost of the weighing.

48 Rule 16 (b) of the tariff declares that "Where proper facilities are provided at destination for obtaining hoof weights, the weights so obtained after the stock has been fed and watered, will be the proper basis for assessing freight charges", subject to certain enumerated fill allowances; and that "If the stock has not been fed and watered, destination hoof weight will be used without de-

duction for fill." This tariff does not expressly declare that the stock shall be hoof weighed at destination. Moreover, to sustain complainants' interpretation would render meaningless paragraph (e), which provides in effect that all weights furnished at Cincinnati will be subject to verification by the carriers. In additional support of the view that this tariff provides merely an alternative method of determining the freight charges, defendants refer to paragraph (f) wherein it is stated that where arrangements are not made at destination for the use of hoof weights, or where shipments move between stations (not markets) upon which actual weights are not obtainable, then the track-scale weights of cars loaded and empty will be used to determine the freight charges. Paragraph (h) specifies that when weights under the foregoing rules can not be obtained at origin or destination the shipment will be subject to paragraph (a) which provides that in no case will charges be collected on less than the established carload minimum weight. Consideration of the various provisions of defendants' tariff relative to weighing leads to the conclusion that their contention should be sustained.

Section 15 (5) of the Interstate Commerce Act provides, among other things, that, in the transportation of ordinary livestock in carloads, delivery at public stockyards of inbound shipments into suitable pens shall be made without extra charge to the consignees. The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and taking them from the carriers' premises without a yardage charge. Not until the livestock can be so removed does the line-haul transportation cease. In *Southwestern Horse & Mule Assn. v. Atchison, T. & S. F. Ry. Co.*, 129 I. C. C. 730, a yardage charge on horses, mules, burros, and asses collected at the public stockyard in North Fort Worth, Tex., by the Fort Worth Stock Yards Company was assailed as unreasonable. This charge was made for the use of the stockyard facilities from the time the animals were taken out of the unloading pens, and for the services rendered, except unloading. In that case it was shown that for several years the line-haul carriers had maintained individual pens and other stockyard facilities at Fort Worth some 2 to 4 miles from the public stockyards that had been and were accessible to and

adequate for the traffic under consideration, and that
49 no yardage charge was made for the use of such facilities. We there expressed the view that transportation of ordinary livestock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards and that this marks the limit of our jurisdiction over such shipments. We found that we were without jurisdiction to determine the issues respecting the yardage charges assailed. In that case, as in the instant case, adequate and accessible facilities were provided whereby the consignees could take delivery without additional charges.

We find that the charges assailed are not subject to our jurisdiction. The complaints will be dismissed.

LEE, Commissioner, concurring specially:

With respect to ordinary livestock shipped by rail to public stockyards, it is my opinion that we have no jurisdiction over the imposition of yardage charges on the stock after it has been delivered into suitable pens. *Southwestern Horse & Mule Asso. v. Atchison, T. & S. F. Ry. Co.*, 129 I. C. C. 730.

As was stated by the chairman of the committee on agriculture of the House of Representatives in reporting the bill which became the Packers and Stockyards Act, "the Secretary [of Agriculture] shall have jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction over the shipment."

When the stock is unloaded into suitable pens, our jurisdiction ceases and that of the Secretary of Agriculture attaches. Since the charges here assailed were collected for services alleged to have been rendered after the livestock had been delivered into suitable unloading pens, I concur in the dismissal of the complaint.

Commissioners Brainerd and Porter concur in the result.

EASTMAN, Commissioner, dissenting:

As stated by the majority, the Cincinnati Union Stock Yards is the station of defendant carriers for the delivery and receipt of livestock at Cincinnati. In fact it is their only livestock terminal, and they employ the Cincinnati

Union Stock Yards Company as their agent for this service. Without discussing the question at length, I am of the opinion that the transportation service of defendant carriers on inbound shipments of livestock does not end until the consignee has been given a reasonable time, after notice of the arrival of the shipments at destination, to accept
50 delivery and remove them from the premises. The consignee is lawfully entitled to such service without penalty of any storage or handling charge paid to the carrier or its agent or to anyone else. No pens are "suitable" for delivery within the meaning of section 15 (5) of the Interstate Commerce Act unless they permit of such reasonable opportunity to accept delivery and remove the livestock from the premises after notice of arrival. The tariffs should define the reasonable time to be allowed for this purpose. Here there was no such definition, but I do not understand that defendants contend that complainants took more than a reasonable amount of time in accepting delivery, or that the record warrants such a finding.

So far as the weighing of the livestock at the livestock station is concerned, my understanding is that the tariff made hoof weights so ascertained the basis for the freight charges and that the weighing was done at the instance of the carriers or their agent. It was thus not a service which could be used to support a separate charge against the consignee.

I am authorized to state that Commissioner Aitchison joins in this expression.

51

EXHIBIT "C".

Before the Interstate Commerce Commission.

Docket No. 24091.

THE E. KAHN'S SONS Co., et al.

VS.

THE BALTIMORE & OHIO R. R. Co., et al.

Petition for Reconsideration and/or Rehearing

Samuel V. Markley, Georgetown, Ohio, Counsel for
Petitioner, the Kroger Grocery & Baking Company.

July 29, 1933.

51a

Comes now the Kroger Grocery & Baking Company, a complainant in the above-entitled proceeding,

and separately and on its own behalf respectfully petitions the Commission to reconsider its decision in this proceeding, 192 I. C. C. 705, and/or to grant a rehearing therein. In support thereof petitioner respectfully contends that the Commission's decision is erroneous and contrary to law and should be reconsidered. Petitioner also represents that the unloading pens of the Cincinnati Union Stock Yards are not suitable within the meaning of section 15(5) of the In-

52 interstate Commerce Act and requests, therefore, that this proceeding be reopened for rehearing in order that the Commission may have before it all of the material facts necessary for a proper determination of the issues.

Briefly stated the facts are these:

The complaint assailed as inapplicable certain charges collected on ordinary livestock by the stock yard company.

The livestock was unloaded from the cars into unloading pens which the record does not indicate are not suitable. Complainants shipments were driven from these pens down a narrow alley to scales where the animals were hoof weighed, and then in most instances to holding pens where they were kept until consignees removed them. In certain instances, complainants took delivery at the scales after the stock had been weighed. In certain other instances, consignees, other than complainants, took delivery of the stock direct from the unloading pens. Stockyard employees perform these services. The stockyard company is the agent of defendant carriers for loading and unloading livestock, keeping records thereof, notifying consignees of arrivals and collecting freight charges.

The charge here assailed is not made if the livestock is taken away from unloading pens before it is weighed. It is made when the stock is taken from the unloading pens and weighed, or taken from the unloading pens, weighed, and placed in holding pens. These charges are not named in any tariff on file with the Commission, but are made in purported compliance with a tariff filed with the Secretary of Agriculture under the Packers and Stock Yards Act.

Rule 16(b) of the applicable tariff contained the following provision:

53 Where proper facilities are provided at destination for obtaining hoof weights, the weights so ob-

tained * * * will be the proper basis for assessing freight charges.

Complainants contended that the services rendered were connected with and part of the transportation and as such no extra charge could be made therefor. Defendants, in effect, contended that the services rendered were purely stockyard services and not part of the transportation.

The commission found that the charges assailed were not subject to its jurisdiction.

Exactly upon what reason or reasons this finding was based is difficult to understand as the report does not contain a precise statement as to any particular controlling point. For example, it will be observed that first there is a discussion as to the Commission's jurisdiction over the stockyard company which ends with the statement that in the instant case the stockyards are not owned by defendant carriers. The next point considered is whether Rule 16(b) of the applicable tariff requires that charges be based upon hoof weights, and, with respect to this point defendants' contention is sustained. The last discussion relates to the findings in *Southwestern Horse & Mule Asso. v. Atchison, T. & S. F. Ry. Co.*, 129 I. C. C. 730, with respect to yardage charges assailed as unreasonable, and in which a view was expressed that the transportation of ordinary livestock, in carloads, ended when the animals were unloaded into suitable pens. It will obviously be necessary therefore, for petitioner to consider each of these points with respect to its contention that the Commission erred in its finding and in the application of the law to the facts.

54 The Commission Should Reconsider Its Decision.

As a matter of fact, the precise question presented by this proceeding is whether services rendered by the stockyards are connected with and are a part of the interstate transportation of the livestock in question. If such services are part of the interstate transportation then it is obvious that the Commission has jurisdiction over any charge made in connection therewith. On the other hand, if the services are purely stockyard services rendered to the consignees after transportation has been completed, then it is equally obvious that the Commission has no juris-

diction over any charge made in connection therewith. Accordingly, the answer to the contentions advanced by the stockyards in the instant case depends upon its duties, as agent of the carriers pursuant to the applicable tariff. In other words, if, as agent of the carriers, the stockyard is, under the applicable tariff, required to weigh the livestock and the weighing incidentally includes driving the stock from the unloading pens, then that service is part of the transportation and no charge can be made therefor in addition to the line-haul rate. This leads, therefore, to the question as to the requirements of the applicable tariff.

Section 15(5) of the Interstate Commerce Act provides in part:

“Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include * * * delivery at public stockyards * * * into suitable pens * * *.”

We are not here, for the moment, concerned with any question as to the suitability of pens, as the report
55 shows that there is nothing in the record to indicate that they are unsuitable. The question presented is as to delivery.

Rule 16(b) of the applicable tariff provides that “*Where proper facilities are provided at destination for obtaining hoof weights, the weights so obtained * * * will be the proper basis for assessing freight charges.*” As stated in the report, defendants took the position that it is optional with the consignees whether they desire the freight charges based on the hoof weights obtained at destination or the track-scale weights of the cars, and that it is mandatory to base freight charges on the hoof weights only in instances where that information is obtained. Complainants, on the other hand, took the position that their shipments must be hoof weighed before delivery can be made, and that this weighing, and necessarily the driving and any other service directly connected thereto, is part of the transportation service. The Commission sustained defendants’ contention. Petitioner strenuously contends that, in sustaining defendants’ contention, the interpretation of the applicable tariff, especially as to Rule 16(b) was and is erroneous and contrary to established principles of law relating to tariff interpretation.

In arriving at this interpretation, it was stated that *Rule 16(b) does not expressly declare that the stock shall be hoof weighed at destination*, and in support of this statement, it is argued that mandatory hoof weighing would render meaningless a tariff provision which "in effect" provides for verification of all weights. Petitioner's answer to the last statement is that it is its understanding that any weight is subject to verification, as the
56 weight being part of a rate, illegal charges otherwise could through error be easily collected. Reference is also made to the fact that the tariff in certain instances makes provision for use of track-scale weights. It will be observed from the applicable tariff that, in the instances referred to, hoof weights would be inobtainable on account of lack of facilities, and obviously it would be necessary to use the track-scale weights of the cars or some other method for computing charges. Petitioner is at a loss to understand how this provision could possibly indicate an alternative method of weighing at Cincinnati. In fact, it is submitted that it indicates exactly the opposite, namely, that hoof weighing is mandatory except in those instances where proper facilities are not available.

The language used in Rule 16(b) is plain and clear and certainly cannot in reason be said to be ambiguous. Consequently, *in the absence of ambiguity, it is unnecessary and improper to resort to extraneous matter or other provisions of the tariff in order to place an interpretation thereon. All that is necessary is to read the language in its usual and accepted meaning.* It is true that Rule 16(b) does not declare that *in all cases* livestock shall be hoof weighed at destination, but certainly, in the light of the generally accepted and reasonable meaning of the language used, it does *declare that where proper facilities are provided* then the stock shall be hoof weighed and charges computed on such basis. Furthermore, if it were necessary to resort to other provisions of the tariff properly to understand Rule 16(b), attention is called to the fact that in this tariff a specific charge is invariably stated whenever any special service is rendered. Clearly, therefore,
57 if it was intended that complainants furnish hoof weights or pay for furnishing them, then it could easily have been, *and should have been*, so stated in this respect also.

Although petitioner contends that Rule 16(b) is so clear and unambiguous that it does not admit of interpretation, it is respectfully pointed out that, even if it were necessary to interpret Rule 16(b), a fair and reasonable interpretation would result in the conclusion that hoof weighing was mandatory under all rules relating to tariff interpretation. Pursuant to the principles generally observed in interpreting a tariff, a doubt, an obscure meaning or ambiguity is resolved in favor of the shipper. This is true because the maker of the tariff could and should have made the meaning clear, just as in the instant case it should have been stated if it was intended that consignees should furnish hoof weights. Furthermore, strained and unnatural meaning is never imputed to the language used, but on the contrary, the words or language must be given its every-day meaning. Clearly, therefore, the interpretation placed on Rule 16(b) is directly contrary to these fundamental principles, as any doubt, if it existed, is not resolved in favor of consignees, and certainly it is a strained interpretation to say that hoof weighing is not *required* where *proper facilities* are available. Summing up, petitioner reiterates and respectfully contends that Rule 16(b) of the applicable tariff is clear, plain, and unambiguous and admits of no interpretation whatever and further that, if it could possibly be said to be ambiguous, then under the accepted principles of tariff interpretation and in view of the other provisions of the applicable tariff it clearly *requires* without additional
58 charge hoof weighing at Cincinnati and, the Commission should so find.

At this point petitioner calls attention to the fact that all of complainants shipments were hoof weighed and that, as stated in the report, defendants contend it is mandatory to base charges thereon only when such information has been obtained. Under these circumstances would not the collection of any extra charge be illegal?

Section 15(5) of the Act provides for delivery at public stockyards into suitable pens without extra charge to consignee. Consequently, assuming for the moment that consignees had an option as to weighing (which petitioner contends they did not have), it appears that it would follow that any charge for hoof weighing, in case they so elected, would be illegal because it is well known that the weight is part of the rate. In what way, therefore, could delivery,

that is, *legal delivery*, which implies strict compliance with the tariff and the law, be made if charge for weighing and service incident thereto, is collected? Petitioner contends that, even if such an option existed and were exercised, legal delivery would not be effected if any charge above the line-haul rate were collected by an agent of the carriers who has merely performed a service obviously connected with transportation.

The last discussion in the report relates to the findings in the *Southwestern Horse & Mule Case*, *supra*, wherein a yardage charge was assailed as unreasonable, and in which the view was expressed that the transportation of livestock, in carloads, ends when the stock is unloaded into suitable pens. That case, however, is clearly distinguish-

able from the instant case as the charges were there
59 assailed as unreasonable instead of inapplicable.

Furthermore, it was not contended there that "unloading" or delivery was illegal as is here contended. Clearly, then, unless the word *unloading* as used in that case means mere *removal* from the car into pens, as distinguished from *removal from the car in strict compliance with applicable tariff*, the cases are widely different. In the instant case we are concerned with the question as to what constitutes *legal delivery*. In the *Southwestern Horse & Mule* case, the word *unloading* obviously meant in accordance with the tariff as no question in that respect was raised. That case is, therefore, not controlling here. Furthermore, it is in conflict with the *Allied Packers* case, 161 I. C. C. 641.

The Commission should, therefore, reconsider its decision and find that Rule 16(b) of the applicable tariffs required hoof weighing of the live stock in question; that such weighing was a condition to legal delivery within the meaning of section 15(5); and that any charge made for such weighing and services incidental thereto was and is illegal.

A Rehearing Should Be Granted.

As above stated, section 15(5) of the Act provides that ordinary livestock, in carloads, shall be delivered at public stockyards in suitable pens without extra charge. Petitioner represents that it has come to its attention that the unloading pens at the Cincinnati Stock Yards are not suitable within the meaning of the law.

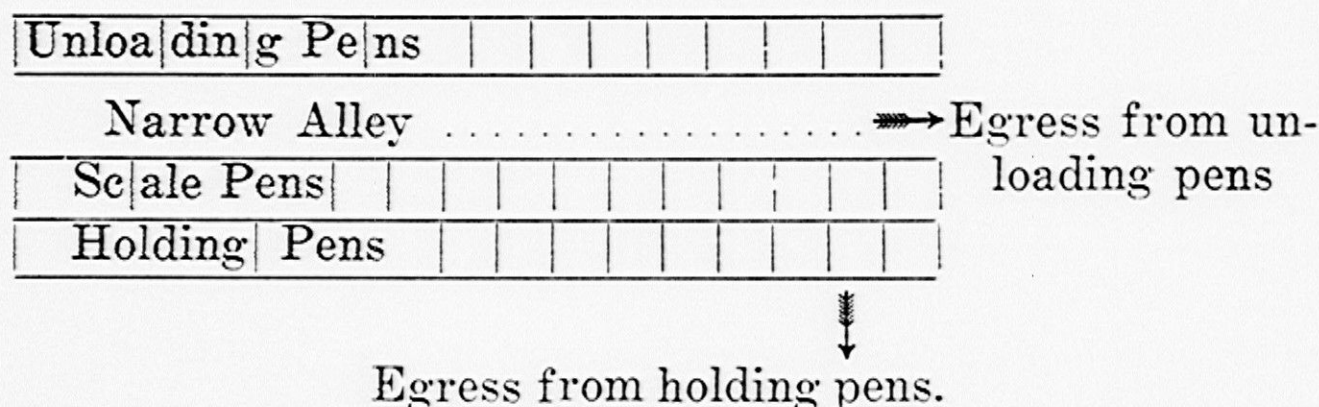
What constitutes a suitable pen has not, as far as petitioner can determine, been anywhere defined. It might well depend upon the rights of the consignee and the public in general. For example, it is generally understood that a consignee has a reasonable time within which to take delivery, and if a reasonable time were, say 8 hours, it would appear that pens in order to be suitable would have to be equipped with water. On the other hand, if a reasonable time to take delivery were only a few minutes, then almost any kind of pens would be suitable, *provided* they are reasonably accessible and adequate to the needs of the consignees. Petitioner believes that the evidence which can and will be adduced, and which will be hereinafter outlined, fully warrants a rehearing of the case to determine the facts. *The evidence will show that the unloading pens are not suitable whether delivery must be taken at once or after several hours, or longer.* The evidence which will be adduced will show:

That the unloading pens for hogs have no facilities for watering and feeding. That the great majority of the unloading pens for cattle are also not equipped for watering and feeding, and are, therefore, not suitable if a reasonable time to take delivery is several hours or longer.

That the unloading pens are immediately adjacent to the railroad tracks, and the only means of egress from these pens is by a narrow alley or space between the unloading pens and the scale pens. (See diagram that follows.) It is impossible to bring a truck near to the unloading pens and there is no ramp by which stock can be driven direct from the unloading pens to trucks. If a consignee desired to take stock from the unloading pens, it would be necessary to drive the animals down and out of the narrow alley or space just mentioned and then by a circuitous route of 300 to 400 feet through the stock yards and into the street, but driving stock in the street is prohibited by law.

61 *In order to take delivery from the unloading pens into trucks, used by all complainants other than Kahn, the animals would have to be driven out of the narrow alley between the unloading and scale pens and then loaded into trucks in anyway possible. On the other hand, delivery from the holding pens into trucks is made by means of a chute up a ramp.*

Railroad tracks



It would appear, therefore, that the unloading pens are not reasonably accessible and do not offer proper facilities for taking delivery whether that be a few minutes, a few hours, or longer. It is respectfully requested therefore, that a rehearing be granted.

SAMUEL V. MARKLEY,
Georgetown, Ohio,
Counsel for Petitioner,
The Kroger Grocery & Baking Company.

July 29, 1933.

62 Certificate of Service.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to each other party.

Dated at Washington, D. C., this 29th day of July, 1933.

SAMUEL V. MARKLEY,
Counsel for Petitioner,
The Kroger Grocery & Baking Company.

63 Answer of Respondent Interstate Commerce Commission to Amended Petition.

Filed Dec. 26, 1933.

* * * * *

The Interstate Commerce Commission, respondent in the above-entitled cause, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the relator's amended petition contained, for answer thereto or

unto so much or such parts thereof as this respondent is advised is material for it to make answer unto answers and says:

I.

Answering paragraphs I to III, inclusive, of the amended petition, the Commission admits that the allegations therein contained are true, except that the Commission denies the allegation contained in paragraph III(a) that it is a quasi-judicial tribunal; and the Commission alleges and states that it is purely an administrative body exercising quasi-judicial duties as defined and directed by the Interstate Commerce Act.

II.

Answering paragraph IV of the amended petition, the Commission admits and alleges that the Baltimore & Ohio Railroad Company and the other common carriers by railroad duly filed with the Interstate Commerce Commission the tariff described in said paragraph and that a true copy of said tariff is attached to the amended petition as Exhibit A thereto. The Commission further admits and alleges that the relator's shipments of livestock referred to in the amended petition were handled by said railroads under and in pursuance of said tariff.

64 Further answering said paragraph the Commission admits and alleges that the Cincinnati Union Stock Yards Company, as agent for the Baltimore & Ohio Railroad Company and other railroad companies named in the amended petition, collected from the relator upon certain shipments of ordinary livestock consigned to relator at Cincinnati, Ohio, during the three-year period immediately prior to December 5, 1930, the legal charges for the transportation thereof, as provided for in said tariffs, but the Commission denies that any such charges in addition thereto were collected by said railroad companies or by said Stock Yards Company, as agent for said railroad companies or any of them, and the Commission further says that any other charges which the relator may have paid to said Stock Yards Company were for stockyard services rendered by said Stock Yards Company, as defined in the Packers and Stockyards Act, 1921, subject only to the jurisdiction of the Secretary of Agriculture, and were covered by a tariff of said Stock Yards Company

published in compliance with said Packers and Stockyards Act, 1921, and duly filed in accordance with said Act with the Secretary of Agriculture.

III.

Answering paragraph V of the amended petition, the Commission admits the allegations therein contained are true, except that the Commission denies that the said Stock Yards Company is a common carrier; denies that it is subject to the provisions of the Interstate Commerce Act, and denies that the allegations contained either in the amended complaint or in the "Petition For Reconsideration And/Or Rehearing," referred to in said paragraph, are true.

65

IV.

Answering paragraphs VI to IX, inclusive, of the amended petition, the Commission denies that said paragraphs set out a full, true or correct statement of the Commission's conclusions of fact as stated by the Commission in its report, Exhibit B to the relator's amended petition, and the Commission further denies that it either erroneously or without warrant of law dismissed relator's complaint upon either an unwarranted or an improper or an erroneous conclusion of law.

Further answering said paragraphs VI to IX, inclusive, the Commission denies that in the report and order of the Commission, dated April 10, 1933, there was in law either a failure or a refusal of the Commission to exercise its lawful jurisdiction relative to the awarding of damages alleged in said amended complaint to have been sustained by the complainants therein; denies that any action of the Commission in the premises was in law arbitrary, and denies each of and all the allegations to the contrary contained in said amended petition. Further answering said paragraphs, the Commission alleges that prior to the making, entering and serving of said report and order as aforesaid, it accorded to the parties to said proceeding, including the relator herein, the full hearings provided for in the Interstate Commerce Act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said report and order was submitted to the Commission for consideration on behalf

of said parties, including the relator herein, by their respective counsel; that at said hearings questions relating to said matters were fully argued and submitted to the

Commission for determination on behalf of said
66 parties by their respective counsel, whereupon the Commission determined said matters and made and entered its said report, Exhibit B to relator's amended petition, and its order dismissing relator's complaint, which report and order included the Commission's decisions, conclusions and order in the premises; that upon the evidence before it, and as shown in and by said report and order, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully justified by the law and the evidence before the Commission in said proceeding. The Commission further alleges that in making said report and order it considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance and condition called to its attention by or on behalf of the parties to said proceeding by their respective counsel.

Further answering the amended petition, the Commission denies that the relator is entitled to either the relief prayed for or any relief in the premises.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said amended petition, in so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said report and order of the Commission aforesaid, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to maintain and prove as this Honorable Court shall direct, and hereby prays that the relator's prayer for mandamus be denied and its suit dismissed.

INTERSTATE COMMERCE COMMIS-
SION,
By NELSON THOMAS,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel, of Counsel.

67 CITY OF WASHINGTON,
District of Columbia, ss:

Patrick J. Farrell, being duly sworn, deposes and says that he is a member and Chairman of the Interstate Commerce Commission, the above-named respondent, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

PATRICK J. FARRELL.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 26th day of December, 1933.

[NOTARIAL SEAL.]

JOHN B. SWITZER,
Notary Public.

Copy of above answer to amended petition received this 26th day of December, 1933.

HARRY FRIEDMAN,
Attorney for Relator.

Demurrer to Respondent's Answer.

Filed Jan. 3, 1934.

* * * * *

Comes now the relator by its attorneys and says that the answer of the respondent Interstate Commerce Commission filed in the above-entitled cause is bad in substance and for reasons for said demurrer, and the matters of law intended to be argued in support thereof, assigns the following:

1. That the petition states a cause of action, and the respondent's answer admits the essential allegations
68 of the petition and makes no material allegations of fact in contravention of the petition.
2. That said answer states no facts which, if true, constitute a defense herein or show any reason why the relief prayed for in the petition should not be granted.
3. That said answer admits that respondent has found as a conclusion of fact that the carriers and their agent named as defendants in the complaints have demanded and collected from relator, on each and every shipment made as described therein, certain charges, not named in any

tariff on file with respondent, over, above, and in addition to the charges named in the applicable tariff I. C. C. No. W. L.-9881, and that, in view of the requirements of sections 6 and 15 (5) of The Act to Regulate Commerce, said answer sets forth nothing to justify respondent in concluding that said additional charges were not subject to its jurisdiction.

4. That the conclusions of law stated in said answer with respect to the interpretation and requirements of Rule 16 (b) of the applicable tariff filed pursuant to section 6 of said Act are erroneous and without legal justification.

5. That the conclusions of law stated in said answer with respect to the requirements of section 15 (5) of said Act are erroneous and without legal justification.

Attached hereto is a statement of points and authorities relied upon.

SAMUEL V. MARKLEY,
HARRY FRIEDMAN,

Attorneys for Relator.

An oral hearing of the foregoing demurrer is respectfully requested. In my judgment it will require at
69 least one hour for each side to present the oral argument.

HARRY FRIEDMAN,

Attorney for Relator.

Service of a copy of the foregoing demurrer, together with the attached statements of points and authorities in support thereof, acknowledged this 3d day of January, 1933.

DANIEL W. KNOWLTON,

Attorney for Respondent.

Supreme Court of the District of Columbia.

Tuesday, January 23, 1934.

Session resumed pursuant to adjournment.

Hon. Chief Justice Alfred A. Wheat, presiding.

* * * * *

This cause having been heard upon the amended petition, the exhibits thereto attached, the answer of respondent to

said petition and the demurrer of the relator to said answer and the same having been fully argued by the attorneys for the respective parties hereto, it is ordered that said demurrer be, and the same is hereby overruled.

Whereupon, comes now the relator by its attorney of record and now, in open Court, elects to stand upon said demurrer and the Court having overruled said demurrer judgment is ordered in accordance therewith.

Wherefore, it is considered that relator take nothing by this action that respondent go hence without day, be for nothing held and recover of relator its costs of defense to be taxed by the clerk and have execution thereof.

70 From the foregoing judgment the relator by its attorney of record, in open Court, notes an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum.

January 27, 1934.—\$50.00 cash deposited in lieu of bond on appeal.

Assignment of Errors.

Filed Jan. 27, 1934.

* * * * *

Comes now the relator, United States of America ex rel. Kroger Grocery & Baking Company, by its attorney, and says that the Supreme Court of the District of Columbia erred in the following particulars, which, upon its appeal to the Court of Appeals, said relator assigns as errors:

1. The Court erred in overruling relator's demurrer to answer to amended petition.

2. The Court erred in refusing to grant the writ of mandamus as prayed for in the amended petition.

3. The Court erred in dismissing the relator's amended petition for writ of mandamus.

4. The Court erred in entering judgment against the relator and for the respondent.

71 5. The Court erred in refusing to issue a writ of mandamus requiring respondent to take jurisdiction of relator's complaint and to enforce the applicable statute and tariff.

6. The Court erred in other respects apparent of record.

HARRY FRIEDMAN,
Attorney for Relator.

SAMUEL V. MARKLEY,
Of Counsel.

Service of copy of the foregoing assignments of errors is acknowledged this 27th day of January, 1934.

NELSON THOMAS,
Attorney for Respondent.

Designation of Record.

Filed Jan. 27, 1934.

* * * * *

Comes now the relator, United States of America ex rel. Kroger Grocery & Baking Company, by its attorney of record and designates the parts of record which it desires to have included in the transcript of record in this case on appeal, and respectfully requests the Clerk of the Court to prepare the transcript of record on appeal to the Court of Appeals of the District of Columbia and to include therein the following:

1. December 14, 1933.—Amended Petition for Writ of Mandamus and Exhibits A, B and C attached thereto.

2. December 26, 1933.—Answer of respondent to amended petition.

3. January 3, 1934.—Demurrer to Respondent's Answer.

72 4. January 23, 1934.—Order overruling relator's demurrer and dismissing petition. Election to stand upon demurrer. Notation of Appeal. Bond fixed at \$100.00 or deposit of \$50.00 cash.

5. January 27, 1934.—Memorandum of deposit of \$50.00 cash in lieu of bond.

6. January 27, 1934.—Assignment of errors.

7. January 27, 1934.—This Designation of Record.

HARRY FRIEDMAN,
Attorney for Relator.

SAMUEL V. MARKLEY,
Of Counsel.

Service of copy of foregoing Designation of Record is hereby acknowledged this 27th day of January, 1934.

NELSON THOMAS,
Attorney for Respondent.

73 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 72, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 83358 at Law, wherein The United States of America, ex rel. The Groger Grocery & Baking Company, a Corporation, is Relator and The Interstate Commerce Commission is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of March, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

74 In the Court of Appeals of the District of Columbia,
January Term, 1934.

No. 6195.

UNITED STATES OF AMERICA ex rel. THE KROGER GROCERY &
BAKING COMPANY, a Corporation, Relator,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent.

Designation for Printing Record.

Comes now the relator, United States of America, ex rel. Kroger Grocery & Banking Company, by its attorney of record and respectfully states that all the errors set forth in the assignment of errors will be prosecuted on appeal,

and designates the following parts of the record which it thinks necessary for a consideration of the questions involved:

1. Caption.
2. Amended Petition for Writ of Mandamus.
3. The following portions of Exhibit A of Amended Petition:
 - (a) Page 1—being numbered page 16.
 - (b) Rules 15 and 16.
 - (c) Subparagraph 9 of Rule 24.
4. Exhibits B and C of Amended Petition.
5. Answer of Respondent to Amended Petition.
6. Demurrer to Respondent's Answer.
7. Demurrer Overruled, Judgment Ordered, Judgment Appeal Noted by Relator, Undertaking to Act as a Cost Bond Fixed, &c.
8. Memorandum: \$50.00 cash deposited in lieu of Bond on Appeal.
9. Assignment of Errors.
10. Designation of Record.
11. Clerk's Certificate.

HARRY FRIEDMAN,
Attorney for Relator.

Service of copy of foregoing Designation for Printing Record is hereby acknowledged this 30th day of March, 1934.

NELSON THOMAS,
Attorney for Respondent.

75 [Endorsed:] No. 6195. In the Court of Appeals of the District of Columbia, January Term, 1934. UNITED STATES OF AMERICA ex rel. THE KROGER GROCERY & Baking Company, a Corporation, Relator, vs. Interstate Commerce Commission, Respondent. Appellant's Designation for Printing Record. Court of Appeals, District of Columbia. Filed Mar. 30, 1934. Henry W. Hodges, Clerk. Harry Friedman, Attorney and Counsellor at Law, Munsey Building, Washington, D. C.

76 In the Court of Appeals of the District of Columbia,
January Term, 1934.

No. 6195.

UNITED STATES OF AMERICA ex rel. THE KROGER GROCERY &
BAKING COMPANY, a Corporation, Appellant,

v.

INTERSTATE COMMERCE COMMISSION, Appellee.

Appellee's Designation for Printing Record.

Comes now the appellee, Interstate Commerce Commission, by its attorney of record, and respectfully designates for printing, as necessary to the consideration of the questions involved, the following additional parts of the record:

1. The following portions of Exhibit A to the amended petition (referred to in item 3 of appellant's designation):

(a) The words and figures set out on page 11 of said Exhibit A, down to the end of Rule 1, subparagraph o.

(b) Rules 21, 22 and 23, on pages 19, 20 and 21 of said Exhibit A.

(c) The following parts of Rule 30 on page 25 of said Exhibit A:

The caption "Minimum Weights" and the second, third and fourth tabulations of said rule covering minimum weights for cars of various sizes upon cattle, calves, hogs, goats, sheep.

77 (d) Rule 31, on page 26 of said Exhibit A.

NELSON THOMAS,

Attorney for Appellee.

Service of copy of the foregoing "Appellee's Designation for Printing Record" is hereby acknowledged this 2d day of April, 1934.

HARRY FRIEDMAN,
D.

Attorney for Appellant.

78 [Endorsed:] No. 6195. In the Court of Appeals of the District of Columbia. United States of America ex rel. The Kroger Grocery & Baking Company, a Corporation, Appellant, v. Interstate Commerce Commission, Ap-

pellee. Appellee's Designation for Printing Record. Court of Appeals, District of Columbia. Filed Apr. 2, 1934. Henry W. Hodges, Clerk. Interstate Commerce Commission, Nelson Thomas, Attorney.

Endorsed on cover: District of Columbia Supreme Court. No. 6195. The United States of America, ex rel. The Kroger Grocery & Baking Company, a Corporation, Appellant, vs. The Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Mar. 30. 1934. Henry W. Hodges, Clerk.

(4856-C)

MAY 25 1934

Henry H. Markley

CLERK

IN THE
Court of Appeals, District of Columbia

JANUARY TERM, 1934.

No. 6195.
SPECIAL CALENDAR.

UNITED STATES OF AMERICA EX REL., THE KROGER
GROCERY & BAKING COMPANY, a corporation,
Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, *Appellee.*

BRIEF FOR APPELLANT.

HARRY FRIEDMAN,
538 Munsey Building,
Washington, D. C.,
Attorney for Appellant.

SAMUEL V. MARKLEY,
Georgetown, Ohio.
Of Counsel.

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IN THE
Court of Appeals, District of Columbia

JANUARY TERM, 1934.

No. 6195.
SPECIAL CALENDAR.

UNITED STATES OF AMERICA EX REL., THE KROGER
GROCERY & BAKING COMPANY, a corporation,
Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, *Appellee.*

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from the decision of the Supreme Court of the District of Columbia overruling a demurrer filed by the appellant, United States Ex Rel The Kroger Grocery & Baking Company, a corporation, to the answer of the Interstate Commerce Commission to its petition for a writ of mandamus to com-

pel the Interstate Commerce Commission to take jurisdiction of its claims against the Cincinnati Union Stock Yard Company, the Baltimore & Ohio Railroad Company, et al. (R. 6-7) and dismissing said petition for writ of mandamus.

The facts in the case are fully set forth in the amended petition for writ of mandamus and the answer of respondent. Stated briefly, the material facts are:

The appellant is a consignee of livestock in carload lots with destination at Cincinnati, Ohio. The livestock was shipped over the carriers referred to in the petition (R. 6-7), two of which were the Baltimore & Ohio Railroad Company and the Cincinnati Union Stock Yard Company. The stock yards known as the Cincinnati Union Stock Yard Company was the regularly established agent of the carriers for the purpose of loading and unloading their live stock consignments at Cincinnati, to keep records thereof, to notify consignees of arrival of shipments and to collect the freight charges. (R. 30) The live stock moved under a Tariff W. L. No. 9881 and the appellant paid all charges fixed by that tariff, and in addition paid a further charge to the stock yards which it sought to recover through the Interstate Commerce Commission.

Upon arrival of the livestock at Cincinnati it was unloaded by the carrier or its agent into so-called unloading pens. The livestock was taken from those pens over scales where weighing was done, and placed in holding or delivery pens from which appellant took delivery.

The stock yards made a charge against the appellant for the services in driving the live stock from the unloading pens to the holding pens, weighing, issuing a

weight certificate, watering and keeping the livestock in the holding pens for such time as may be desired by the consignees.

The appellant in its complaint filed with the Interstate Commerce Commission asked reparation and claimed that the tariff made weighing a necessary part of the freight charge and that the service of weighing as well as the services of placing the live stock in the delivery or holding pens was a part of transportation for which no extra charge could be made because not included in any tariff on file with the Interstate Commerce Commission.

The services rendered by the stock yards constituted services of transportation for which no charge in addition to that fixed in the applicable tariff could be made. The Interstate Commerce Commission refused to take jurisdiction on the theory that transportation ended with the placing of the livestock in the unloading pens and that the basing of the freight charges upon hoof weights was optional, at Cincinnati, Ohio, and that consequently such charge was not made for transportation and was not within the jurisdiction of the Interstate Commerce Commission, but came under the jurisdiction of the Packers and Stockyards Act which is administered by the Secretary of Agriculture.

The appellant sought to have the Supreme Court of the District of Columbia issue a writ of mandamus compelling the appellee to take jurisdiction of its complaint. The appellee answered (R. 44) and a demurrer was filed thereto (R. 48). Oral argument was had before Chief Justice Wheat on January 23, 1934, and the demurrer was overruled. (R. 49-50) Appellant elected to stand upon the demurrer (R. 50). Chief Justice Wheat rendered no written opinion.

ERRORS TO BE RELIED UPON.

All of the errors assigned in the Assignment of Errors will be relied upon (R. 50-51).

These assignments present two principal questions:

1. Did the transportation of the livestock end prior to the weighing and delivery thereof to the appellant?
2. If not, does the Supreme Court of the District of Columbia have power to compel the Interstate Commerce Commission to take jurisdiction of the case?

POINTS OF LAW AND AUTHORITIES.

1. A carrier can charge for transportation only such rates as are fixed by tariffs on file with the Interstate Commerce Commission.

Section 6 (7) Title 49, U. S. Code.

2. The Interstate Commerce Commission has jurisdiction over the Cincinnati Union Stock Yard Company.

Section 1 (3) Title 49, U. S. Code,
North Pennsylvania Railroad Co. v. Commercial Bank, (123 U. S., 727),
Covington Stock Yards v. Keith, (139 U. S. 128).

3. Transportation does not end until there is a delivery to the consignee at point of destination.

Section 15 (5) Title 49, U. S. Code.

4. The determination of weight was a necessary element of the freight charge and was a part of the transportation service.

Rule 16, Tariff, W. L. 9881,
 Davis v. Henderson, (266 U. S., 92),
 Davis v. Portland Seed Co., (264 U. S., 403),
 Gooch v. Oregon Short Line, (258 U. S., 22),
 United States v. Miller, (223 U. S., 599).

5. Mandamus is the proper remedy to compel the Interstate Commerce Commission to take jurisdiction.

Interstate Commerce Commission v. Humboldt, S/S Co., (224 U. S., 474),
 United States ex rel, Louisville Cement Co. v. Interstate Commerce Commission, (246 U. S., 638),
 United States ex rel. Kansas City Southern Railway Co. v. Interstate Commerce Commission, (252 U. S., 178),
 U. S. ex rel. Dascomb, et al., v. Board of Tax Appeals, (56 App. D. C. 392).

ARGUMENT.

A Carrier Can Charge for Transportation Only Such Rates as Are Fixed by Tariffs on File With the Interstate Commerce Commission.

It is a fundamental principle that a carrier or its agents can charge for transportation only such rates as are fixed by tariffs on file with the Interstate Commerce Commission. This is specifically provided for by Section 6 (7) of the "Act to Regulate Commerce" approved February 4, 1887, and the Acts amendatory thereto and supplementary thereto, which is Section 6 (7) Title 49 of the Code of Laws of the United States. This section reads as follows:

“No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.”

The Interstate Commerce Commission Has Jurisdiction Over the Charges Made by the Cincinnati Union Stock Yards for Transportation Services.

The Cincinnati Union Stock Yard Company is a corporation engaged in the operation of a public stock yard at Cincinnati, Ohio. It is the depot of the carriers referred to in the complaint filed with the Interstate Commerce Commission and is the regularly established agent of the carriers for the purpose of receiving and delivering live stock at Cincinnati, Ohio. In so far as it performed services of transportation it was a carrier subject to the Interstate Commerce Acts. Its acts as agent for the carriers, under the doctrine of *respondiat superior* were, of course, the acts of the carriers. The jurisdiction over the stock yard and the

other carriers is specifically within Section 1 (3) Title 49 U. S. Code, which read in part as follows:

“The term ‘railroad’ as used in this Act shall include all * * * terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation, or delivery of any such property. The term ‘transportation’ as used in this Act shall include locomotives, cars, and other vehicles, vessels, and *all instrumentalities and facilities of shipment or carriage, irrespective of ownership or any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.*”

See also

North Pennsylvania Railroad Company v. Commercial National Bank, (123 U. S. 727),
Covington Stock Yards v. Keith, (139 U. S. 128).

From the foregoing it is plain that if the charges made by the stockyards as agent of the carriers are transportation charges, the jurisdiction of the Interstate Commerce Commission applies.

The Commission has found as a fact that the charges made by the stockyard “are intended to cover services rendered by the stockyard in driving the live stock from the unloading pens to the holding pens, *weighing*, issuing a weight certificate, watering and keeping the livestock in the holding pens for such time as may be desired by the consignees”. *These charges, the Commission has found, are not on file with it.* They are not included in tariff W. L. No. 9881, the tariff under

which the relator shipments of livestock were handled by the carriers. (Respondents' answer, paragraph 2.) If the additional charge made by the stockyard as agent for the carrier was in whole or in part for services of transportation it was an illegal charge.

**TRANSPORTATION OF LIVESTOCK DOES NOT
END UNTIL THERE IS A DELIVERY AT
POINT OF DESTINATION.**

The Interstate Commerce Act (Section 15(5)) defines transportation of livestock and the services included in transportation as follows:

*“Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner * * *”.*

The word “delivery” as used in the act means a delivery sufficient in law to end the transportation services in compliance with the applicable tariff.

Kansas City Southern Railway Co. v. Carl, (227 U. S. 639).

Section 3 (2) Title 49, U. S. Code.

The law requires as a part of transportation delivery into suitable pens and delivery in strict compliance with the tariff. The Commission here held that unloading was all that the law required, supplanting the word “delivery” with “unloading”.

The term “delivery” as used in the act means something more than mere unloading from the cars.

The two words are not synonymous and in *Covington v. Keith* (*supra*), the Supreme Court, in fixing the obligation of railroad, said that the transportation ended not with unloading, but with *delivery*, the court stating:

“A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is *unloaded and delivered*, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.”

Unloading is an act of the carrier alone. Delivery requires joint action by the carrier and the consignee as in the delivery of a contract. It contemplates actual or constructive transfer from one person to another, whereas unloading is a unilateral matter. In delivery there must be a receipt or offer to transfer to the consignee with reasonable time to remove by the

consignee before there can be said to be a delivery. The consignee must either receive the shipment or have been given a reasonable opportunity to receive it before there is a delivery.

Covington v. Keith, (*supra*).

In Street v. Lincoln Safe Deposit Company, (254 U. S. 88) the mere availability of the property for taking by the owner was held not to be a "delivery". That case is not exactly analogous, but it does show that delivery requires a positive act by the one in possession.

Transportation of live stock ends only after the live stock is *unloaded and delivered*. A mere unloading into pens is not compliance with the law. There must be notice to the consignee, weighing, freight bills prepared and there must be a reasonable time allowed to remove the livestock. The delivery must be into pens that are suitable.

It is the duty of a common carrier to notify the consignee on their arrival at their destination. The stock yard here was employed for that purpose.

North Pennsylvania Railroad Company v. Commercial Bank of Chicago, (123 U. S. 727).

As stated by Commissioner Eastman, (R. 35-36) the law must contemplate the allowance to consignee of a reasonable opportunity to accept delivery and remove the live stock from the premises after notice of arrival. This is clearly the intent of the law. In Michigan Central v. Owen Company (256 U. S., 427), the Supreme Court of the United States held the carrier responsible as a carrier, for the loss of a shipment after it

had been placed on the public delivery track of the railroad, but before freight could be removed even though the consignee accepted the car and started to unload it. The Court said:

“The property here was not delivered; access only given to it that it might be removed, and 48 hours were given for the purpose. Pending that time it was within the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation.”

The mere unloading into the unloading pens, was not the end of the transportation service. Something more remained to be done by the railroad. The live stock had to be delivered and that was not done and could not have been done until the live stock was weighed and the freight charge determined and notice furnished the consignee of the arrival and the freight charge. To do this the live stock had to be moved from the unloading pens to the holding or delivery pens, being weighed en route.

The pertinent provision of law quoted hereinbefore is Section 15 (5) requires live stock in carload lots to be delivered “*into suitable pens*”, without extra charge therefore to the shipper.

The charges include the cost of moving the live stock to where it was available for delivery. The unloading pens at Cincinnati are not suitable pens. They are equipped with facilities for watering, but not for feeding livestock. They have a limited capacity. As live stock, like humans, must be fed at reasonable intervals it is manifest that the unloading pens cannot be suitable for retention of the animals over the rea-

sonable time allowed for removal after unloading. For example live stock received late Saturday must be held over until Monday. That live stock is not held in the unloading pens, but is driven to the holding pens. The consignee is charged for this service although it was a necessary part of transportation to provide a place to take delivery at reasonable times. Why should the appellant be compelled to pay an extra charge for driving the live stock from the unloading pens to the holding pens when that is done by the carrier to comply with the requirements of furnishing suitable pens?

No pens in which the animals cannot be held for a reasonable time, certainly over Sunday and holidays, can be suitable pens within the fair interpretation of the law.

The Commissioner's opinion acknowledged that:

“The shipping public is entitled to reasonably convenient and safe, chutes, pens and way for discharging live stock from the cars, and taking them from the carriers premises without a yardage charge. *Not until the live stock can be so removed does the line-haul transportation cease.*”

but it fails to give recognition to this principle by holding that transportation ended with unloading into pens which did not permit of a reasonable time for removal and by permitting an extra charge not only for weighing but for driving live stock to the holding pens even where that was necessary to hold the live stock over Sundays and holidays.

The Determination of the Weight Was a Necessary Element of the Freight Charge and Was Part of the Transportation Service for Which No Extra Charge Can Be Exacted by the Carrier or Its Agents.

The tariff, under which appellant's shipments moved, provides in Rule 16 as follows:

- a. In no case will the charges be collected on less than the established carload minimum weight.
- b. Where proper facilities are provided at destination for obtaining hoof weights, the weights so obtained after the stock has been fed and watered, will be the proper basis for assessing freight charges, with the following fill allowances:

Calves No deduction

Cattle, carloads, en route 12
hours or less 500 pounds

Cattle, carloads, en route over 12
hours 800 pounds

Hogs, single deck cars 300 pounds

Hogs, double deck cars 600 pounds

Sheep and goats No deduction

If stock has not been fed and watered, destination hoof weight will be used without deduction for fill.

- c. Where actual weight is applied on mixed shipments, the fill allowances shall be based on the species of stock which set the rate under the minimum rule in Rule 30-g, page 26.
- d. When two or more carloads of the same kind of live stock are offered for shipment by one

owner on the same day, from the same station, destined to a market point at which the hoof weight is the basis for assessing freight charges, the aggregate weight of the shipment will be divided between the number of cars in the shipment, subject to the established car-load minimum weight. In event more than one kind of live stock is so shipped, each class shall be dealt with separately. Cattle weights cannot be added to hog weight, nor sheep and goat weights to either of the others.

- e. All weights furnished at market points (see Rule 15, page 16), will be subject to verification by the carriers.
- f. (1) Where arrangements are not made at destination for the use of certified hoof selling weights as a basis for determining freight charges, or
(2) Where shipments move between stations not markets) upon which actual weights are not obtainable, then
(3) The track scale weights of cars loaded and empty will be used to determine freight charges.
(4) Corrections, however, will be made from track scale weight to the certified hoof selling weight when supplied by consignee, if such weight is greater than the net track scale weight by more than 500 pounds per car. (See paragraph "a").
- g. (1) On carloads shipments of live stock forwarded for market points (see Rule 15, page 16), to points not markets, the hoof selling weight obtained after the stock has been fed and watered will be supplied by shipper and used as basis for collection of freight charges.

(2) The following allowances for fill on live stock will be deducted from the hoof selling weights before waybilling:

Cattle	500 lbs. per car
Hogs, single deck	300 lbs. per car
Hogs, double deck	600 lbs. per car
Sheep and goats	No deduction

(See Paragraph "A")

(3) In the event of the hoof selling weights cannot be obtained the carrier must track scale the car empty and loaded and used weights so ascertained for the collection of freight charges.

NOTE: The term "hoof weights" as used herein signifies "hoof selling weights" whenever hoof selling weights are obtained.

h. When weights under the foregoing rules cannot be obtained at origin or destination shipment will be subject to Paragraph "a".

Rules 15 and 24 (9) of the tariff designate the Cincinnati Union Stock Yard as a regularly established stock yard and weighing bureau.

The Supreme Court of the United States has established the requirement that tariffs be strictly construed in favor of the shipper and strictly complied with by the carrier. There must be a delivery in strict compliance with the tariff. Where the tariff, as here, is in simple language, its interpretation is one of law. There is no room for discretion in the Commission. The tariff must be construed in accordance with its plain terms in the same manner as if it were a statute.

Davis v. Henderson, (266 U. S. 92).

Davis v. Portland Seed Company, (264 U. S. 403).

Gooch v. Oregon Short Line, (258 U. S. 22).

United States v. Miller, (223 U. S. 599).

The plain language of Rule 16 of the Tariff is to require the freight rates charged on live stock shipped in carload lots destined to the Cincinnati Union Stock Yards to be fixed on the basis of hoof weights. The stock yard is the agent of the carrier for the purpose of collecting the freight charges based upon such weights. The duty of weighing is on the railroad. Elliott on Railroads, paragraph 2368:

“So, it may charge for terminal services rendered after the completion of the transportation, or for services rendered in conveying property from its depot or regular place for receiving and delivering goods to an elevator and the like, or for furnishing food necessary for live stock where it is the owner’s duty to furnish it and he fails to do so. *But extra charges can not be made under ordinary circumstances for furnishing proper station accommodations, weighing, checking, loading and unloading goods, or the like, as these things are usually incidents of the carriage and come within the ordinary duty of the carrier as such.*”

Weighing to determine the amount of the freight charge is part of transportation and no charge can be made for it unless fixed in the tariff. Here the weighing was necessary by the railroad in order to determine the amount of the freight charges to be collected by its agent, the Cincinnati Union Stock Yard. The Commission suggests that under the Tariff, it is optional with the railroads to charge on the basis of hoof weight, but an analysis of Rule 16 of the tariff clearly shows that there was no option at Cincinnati.

Rule 16 provides, first, that where proper facilities are provided at destination for obtaining hoof weights, the weights so obtained will be the proper basis for assessing freight charges. That requirement is clear and unambiguous. It is not disputed that the proper

facilities were available at Cincinnati and the tariff (Rule 15 and 24(a)) so provides. Rule 16 then provides that where facilities for obtaining hoof weights, are not available or where shipments move between stations where actual weights are not obtainable, then the track weight, shall be used, so that the tariff is designated to fit two conditions first, where, at point of destination, weights can be obtained the rates must be based on those weights; second, where, at destination facilities for weighing are not available track scale weights must be used and third, in no case shall the charges so determined be less than the carload minimum weight fixed in the tariff. There is no discretion in the matter at all. The tariff is in plain language and must be construed the same as to all shippers in order to avoid discrimination. All carload shipments to Cincinnati must be based upon hoof weights in order to ascertain the freight charges to be collected by the carrier. It is a function of the carrier to determine such weights in order to ascertain the freight charges to be collected by the carrier. It is a function of the carrier to determine such weights in order to fix its charges and it is therefore a part of transportation for which no extra charge should have been made.

It is respectfully submitted that the charges made were for transportation and that, therefore, the appellee should be compelled to invoke its jurisdiction and to award appellant appropriate relief.

Mandamus is the Proper Remedy to Compel the Interstate Commerce Commission to Take Jurisdiction of the Case.

The appellant respectfully submits that in this case the courts have power to issue a writ of mandamus as

the Interstate Commerce Commission denied its jurisdiction of the controversy, the decision denying reparation being predicated on the ground that "*the charges assailed are not subject to our jurisdiction.*"

Consequently, the dismissal was based on lack of jurisdiction by the Commission. In such cases the Courts have power to issue a writ of mandamus to compel the Commission to take jurisdiction, even though the result of the granting of the writ may compel the Commission to grant reparation.

Interstate Commerce Commission v. Humboldt S/S. Co., (224 U. S., 474),

United States ex rel Louisville Cement Co. v. Interstate Commerce Commission, (246 U. S. 638),

United States ex rel. Kansas City Southern Railway Co. v. Interstate Commerce Commission, (252 U. S. 178),

U. S. ex rel. Dascomb, et al. v. Board of Tax Appeals, (56 App. D. C. 392).

Any judicial or quasi-judicial tribunal may dismiss a case not within its jurisdiction. Whether such dismissal was proper can be reviewed by the courts. *Ex parte Crane*, 5 Pet. 190; *In re: Pennsylvania*, 137 U. S. 451. To concede to a tribunal the unreviewable power to determine its own jurisdiction opens the way to the most flagrant violation of the will of the legislature.

The Courts cannot abdicate their supreme duty of interpreting the laws of Congress. The power even of the courts themselves, are and must be subject to checks and balances so that no such tribunal can autocratically usurp power or refuse to exercise the powers granted to it. (*Ex Parte Crane, supra.*)

In most instances in which the question of the jurisdiction of a tribunal is brought into controversy there usually are some mixed question of law and fact which must be determined before the question of jurisdiction can be decided. To permit the tribunal to defend its denial of jurisdiction on the premise that it has considered the facts before reaching its conclusion of no jurisdiction permits it to determine its own jurisdiction without review.

Here the problem is one of jurisdiction. If the charge is a charge for transportation, of course, the Interstate Commerce Commission has jurisdiction. If it is not, the Interstate Commerce Commission does not have jurisdiction. Are we to say that the Interstate Commerce Commission is the sole judge of its own jurisdiction merely because it gave consideration to the character of the charge? If we assume that the charge was one of transportation, no one could even question the power of the court to issue a writ of mandamus to compel the Interstate Commerce Commission to take jurisdiction. On what premise can it be said that the courts have no power to determine whether the charge was one of transportation if they must ascertain that fact before ascertaining whether Interstate Commerce Commission had jurisdiction.

An order by a Court compelling the I. C. C. to take jurisdiction perchance may result in deciding the real issue, but as said by the Supreme Court of the United States in *Louisville Cement Co. v. Interstate Commerce Commission* (*supra*):

“The unusual and purely fortuitous circumstance, that the character of this jurisdictional limitation on the power of the Commission chances to be such that the giving of a correct construc-

tion to it must result in determining the character of the decision which the Commission must render when the case is returned to it, cannot affect the power of this court or that of the lower courts to define what that jurisdiction is under the act of Congress or the duty of the Commission to accept and act upon such definition when announced."

In *Interstate Commerce Commission v. United States ex rel. Humboldt Steamship Company* (*supra*), the Commission refused to take jurisdiction of a complaint against a Railroad operating between Alaska and points in Canada and other places. The Railroads filed answers and a hearing was had before the Interstate Commerce Commission which decided that it was "without jurisdiction to make the order sought by complainant" on the theory that Alaska was not a "territory" within the meaning of the Interstate Commerce Act. In this the Interstate Commerce Commission erred.

The Commission contended that the Courts had no power to issue a writ of mandamus to correct its mistake. The Supreme Court of the United States held that the writ should be granted, stating:

"The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. *Ex parte Harding*, 219 U. S. 363. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is

purely an administrative body. It is true it may exercise and must exercise *quasi* judicial duties, but its functions are defined and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed? * * *

“In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to so do as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the Court of Appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission ‘to take jurisdiction of said cause and proceed therein as by law required.’ ”

In *United States ex rel. Kansas City Southern Railway Co. v. Interstate Commerce Commission* (252 U. S. 178) the Interstate Commerce Commission disregarded the express mandate of the law and then audaciously claimed that the Courts had no power to compel it to comply with the law.—An excellent example of the insatiable assumption of authority by the same body that now pleads here that this court cannot ascertain whether it has jurisdiction of a controversy.

The Supreme Court granted the writ stating:

“It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters ‘beyond the possibility of rational de-

termination,' and called for 'inadmissible assumptions', and the indulging in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment,' and that such conclusions were the necessary consequence of the Minnesota Rate Cases, (230 U. S. 352).

"We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and *an unwitting assumption by the Commission of authority which it did not possess*. And the significance which the Commission attributed to the ruling in the Minnesota Rate Cases, even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out, since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the Minnesota Rate ruling could furnish ground for refusing to carry out the commands of Congress, the cogency of which consideration is none the less manifest though it be borne in mind that the Minnesota Rate Cases were decided after the passage of the act in question.

"Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress

gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise.”

In *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission*, (*supra*), the Commission denied jurisdiction of a complaint because it had not been filed within two years from the time the cause of action accrued. The Commission held that the complaint was filed beyond the two year period, arriving at this conclusion by holding that the cause of action arose on the date of shipment, rather than the date of payment. The Supreme Court said:

“It is thus made very clear that the holding of the Commission was, not that having jurisdiction over the claim, upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was jurisdictional and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent it related to the overcharges paid on February 1, 1911, was dismissed.

“We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation but is jurisdictional--is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion (*Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 544). That such was the opinion of this court was clearly intimated in *Phillips Co. v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667, and it conforms in principle to the holdings of the court with respect to a similar limitation, but for six years, on the jurisdiction of the Court of Claims (*Ford v. United States*, 116 U. S. 213:

Finn v. United States, 123 U. S. 227, 232; United States v. Wardwell, 172 U. S. 48, 52).

“That the Supreme Court of the District of Columbia, in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474. If the Commission did so err, on the authority of many decisions, among them *Ex parte Russell*, 13 Wall. 664; *Ex parte Schollenberger*, 97 U. S. 369; *Hollon Parker, Petitioner*, 131 U. S. 221; *In re Grossmayer*, 177 U. S. 48, and *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474, 485, the courts may correct such error on a petition for mandamus, where as in this case, the erroneous decision cannot be reviewed on appeal or writ of error.

“There remains the question, Did the Commission place an erroneous interpretation upon the scope of its jurisdiction under this two-year provision in P. 16 of the act, in excluding the claim which we have before us from its consideration?

* * * * *

“But this two-year provision, obviously enough, relates only to the recovery of money damages, and if Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, we cannot doubt that a simple and obvious form for expressing that intention would have been used, instead of the expression ‘from the time the cause of action accrues.’ And in this connection we cannot fail to recognize that when the statute was enacted the time when a cause of action accrues had been settled by repeated deci-

sions of this Court to be when a suit may first be legally instituted upon it (*Amy v. Dubuque*, 98 U. S. 470, 474; *United States v. Taylor*, 104 U. S. 216, 222; *Rice v. United States*, 122 U. S. 611, 617) and, since no clearly controlling language to the contrary is used, it must be assumed that Congress intended that this familiar expression should be given the well understood meaning which had been given to it by this court. We therefore conclude, as was held, without special discussion of the point, in *Phillips Co. v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, 666, 668, which in this respect really rules the case before us, that the proper construction of this jurisdictional provision requires that the cause of action of the shipper in this case shall be held not to have accrued until payment had been made of the unreasonable charges, and that, therefore, the interpretation which the Commission placed upon its jurisdictional power is erroneous.”

The holding that the Interstate Commerce Commission had jurisdiction disposed of the case for there was no question as to the right of the Cement Company to reparation if its complaint was timely.

These decisions of the Supreme Court are controlling in the instant case. Here the Interstate Commerce Commissioner denied jurisdiction. It erroneously denied jurisdiction. In the cases cited the situations were similar. The decisions are controlling here.

CONCLUSION.

It is established that the Commission erroneously held that the charge assailed was not for transportation services. It is clear, therefore, that the Commission erred in denying jurisdiction. The charge being one for transportation the Commission has no discretion and therefore mandamus will lie. The courts have

the power as a necessary incident of our form of Government to compel the Commission to exercise the jurisdiction granted to it; and the Supreme Court of the United States has settled the rule that Courts can compel the Interstate Commerce Commission to exercise jurisdiction even though to do so may result in deciding the merits of the case.

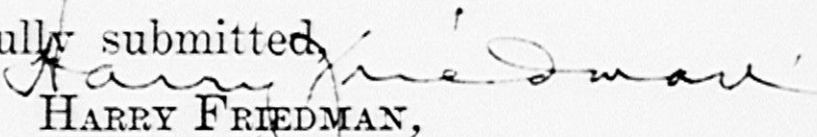
This case is not one in which the Interstate Commerce Commission has taken jurisdiction and then denied relief as in

Interstate Commerce Commission v. Waste Merchants Ass'n. (260 U. S. 32),
Interstate Commerce Commission v. United States ex rel Campbell, (289 U. S. 385),
Standard Oil Co. v. United States, (283 U. S. 235).

All of those cases are later than the decisions cited and relied upon by the appellant, yet they do not qualify or overrule the cardinal principle of law announced therein that:

"In the absence of other modes of judicial review, the Supreme Court of the District of Columbia has power to direct the Interstate Commerce Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared not to be within its jurisdiction."

Respectfully submitted,


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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED SEP 17 1934

Henry W. Hodges
CLERK

No. 6195, Special Calendar

**In the United States Court of Appeals for the
District of Columbia**

JANUARY TERM, 1934

UNITED STATES OF AMERICA EX REL. THE KROGER
GROCERY & BAKING COMPANY, A CORPORATION,
APPELLANT,

v.

INTERSTATE COMMERCE COMMISSION, APPELLEE

**BRIEF FOR INTERSTATE COMMERCE COMMISSION,
APPELLEE**

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SEPTEMBER 1934.

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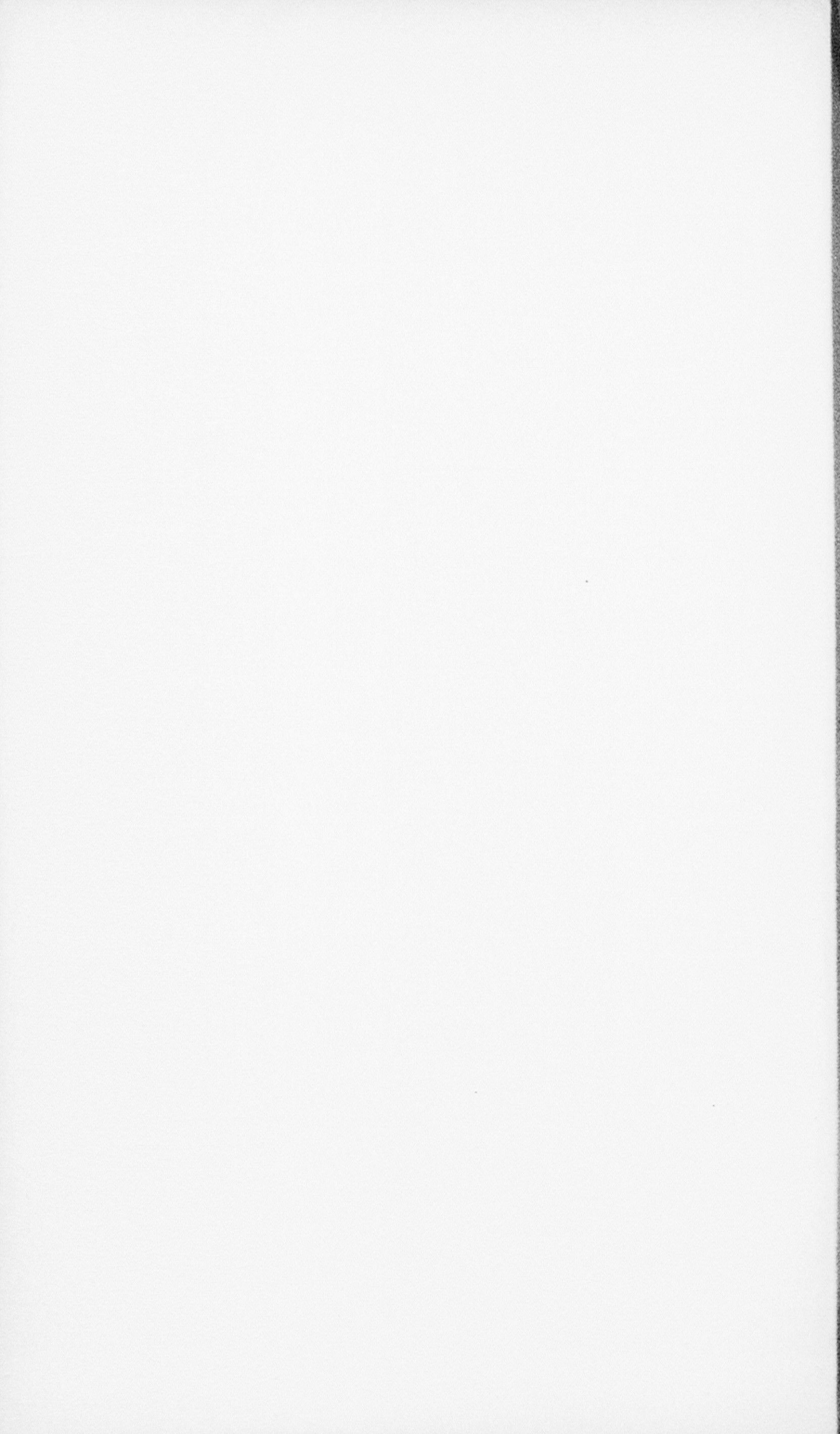
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**United States Court of Appeals for the
District of Columbia**

JANUARY TERM, 1934

No. 6195, Special Calendar

UNITED STATES OF AMERICA EX REL. THE KROGER
Grocery & Baking Company, a Corporation,
appellant

v.

INTERSTATE COMMERCE COMMISSION, APPELLEE

BRIEF FOR INTERSTATE COMMERCE COMMISSION

STATEMENT

This is an appeal from an order of the Supreme Court of the District of Columbia dismissing a petition for mandamus to compel the Interstate Commerce Commission to make an award of reparation under Section 16 of the Interstate Commerce Act.

PROCEEDINGS BEFORE THE COMMISSION

The case arose from several complaints filed with the Commission by the appellant herein and other operators of meat packing concerns in Cincinnati, Ohio, against the several railroads serving that city, naming as a co-defendant the Cincinnati Union Stockyards Company, a noncarrier corporation engaged solely in the business of operating a stockyard.

The several cases were consolidated for hearing and were fully heard and all were decided in the Commission's report in one of the proceedings entitled *E. Kahn & Sons Co. v. Baltimore & Ohio Railroad Co. et al.*, Docket No. 24091, 192 I.C.C. 705 (R. 29). The record in this court does not contain a copy of any of these complaints, but according to the Commission's report the complainants alleged therein that certain yardage charges collected at Cincinnati were in violation of Section 6 and Section 15 (5) of the Interstate Commerce Act. Only reparation was sought.

Section 6 (p. 11 *infra*), above referred to, requires carriers to publish tariff schedules covering all charges for transportation, forbids the rendition of transportation service as defined in the Act, without such publication of charges therefor, and further forbids the charging of a different compensation for transportation than as prescribed in the tariffs published. Section 15 (5) (p. 13 *infra*) provides that the transportation by railroad of ordinary livestock, in carload lots, destined to or received at public stock yards shall include delivery at public stock yards into suitable pens without extra charge to the shipper, consignee, or owner for such service.

The evidence upon which the Commission acted is not before the Court. The record contains the report of the Commission setting out a synopsis of the evidence before it (R. 29), and material portions of the tariff prescribing some of the conditions upon which the shipments in question moved

(R. 13). From these sources of information the following facts appear:

Tariff I.C.C. No. W.L. 9881 of the Baltimore & Ohio Railroad Company (Ex. A to amended petition, R. 13), participated in by the other interstate carriers by railroad entering the city of Cincinnati, provides that the Cincinnati Union Stock Yards, a public stock yard located within the Cincinnati shipping district, should be the regular station for the handling of livestock at that point. The stockyards company is a noncarrier corporation whose business consists of feeding, watering, yarding, weighing, handling, and caring for livestock. It is equipped with what are termed "unloading pens" into which the stock is driven over a platform through chutes, from the railroad cars which are placed on adjacent tracks. These "unloading pens" have an area of 688 square feet, twice that of a 40-foot car. Only a few of these pens have facilities for watering, none has facilities for feeding livestock. At the hearing no unsuitability was shown as to these pens for unloading purposes and there is no contention that egress therefrom and from the stockyards company's premises is unfit. The stockyards company also maintains pens of a different character which are designated the "holding pens" where stock is held to suit the convenience of consignees. These holding pens are equipped with facilities for watering and feeding.

Most of the livestock, comprising the relator's shipments, was, after being taken from the cars into the unloading pens, driven from the unloading pens

to scales where the animals were hoof weighed and thence into the holding pens. Some of the holding pens are marked for the use of the relator and some some of the other packers who were complainants before the Commission. Shipments remain in these holding pens sometimes for several hours, occasionally overnight and during holidays, until desired by consignees. After being hoof weighed the animals are not returned to the unloading pens. Some consignees, other than the relator and the other complainants before the Commission, have taken their stock directly from the unloading pens, passing through alleyways and chutes from the stockyards company's premises. In such cases no charge for stockyard services is made by the stockyards company, the shipper or consignee paying only the transportation charge.

The stockyards company is not owned by the railroads and its charges (which were the subject of the complaint to the Commission) are governed by schedules filed by it with the Secretary of Agriculture pursuant to the terms of the Packers and Stockyards Act, 1921, 42 Stat. 159. It files no tariffs with the Interstate Commerce Commission. Prior to January 1, 1929, the tariff filed with the Secretary of Agriculture provided yardage charges of 15, 7½, 5, and 4 cents per head, respectively, on cattle, calves, hogs, and sheep. Effective on and after said date these charges were doubled by proper tariffs. These charges cover services rendered by the stockyards company in driving the livestock *from* the unloading

pens to the holding pens, weighing, issuing a certificate of weight, watering, and keeping the livestock in the holding pens for such time as may be desired by the consignees. There is no limit to the time the consignments may remain in the holding pens without charge in addition to that above stated, except for feed consumed.

The stockyards tariff provides that no charge shall be assessed by it against consignees in cases where the stock is delivered to the consignees directly from the unloading pens without weighing or use of the holding pens.

The Cincinnati Stockyards Company, by contract with the railroads, is the agent for the latter only for the purpose of demanding and collecting the charge or charges named in the transportation tariff applicable to the shipments and is employed by the railroad companies to unload into the unloading pens the livestock received at Cincinnati, to keep record thereof, and to notify consignees of the arrival of shipments.

The railroads pay the stockyards company for the rendition of the services. The amounts collected by that company from the consignees (other than the line-haul charges which are collected by the stockyards company as agent for, and paid over to the railroads) are for services rendered for the benefit of consignees after the stock has been taken from the unloading pens. If the stock is driven out of the yards from the unloading pens, no payment is exacted

other than of the transportation charges prescribed in the interstate transportation schedules which, as above stated, the stockyards company collects as agent for the railroad.

The stockyards company appeared before the Commission and contended that it was not a common carrier engaged in interstate commerce, was not required to file tariffs with this Commission, and, therefore, was not subject to the Commission's jurisdiction. Complainants took the view that the Commission's jurisdiction over transportation extended to the actual receipt by the consignee, contending that in the instant case such receipt did not take place until after the stock had been weighed and placed in the holding pens; that the law required the carriers to perform the services and supply the facilities covered by the charges for which they sought reparation in order to complete the transportation contract. The railroads contended that the law (Section 15 (5)) required only that their transportation contract include the delivery of the livestock into "suitable pens", and that having paid the stockyards company for driving the stock from the cars into suitable (unloading) pens they had fulfilled their obligation; that in any further handling of the stock the stockyards company was acting as agent, and for the benefit of, the consignee, and that the charges for such further handling had properly been paid by the consignees. It was pointed out that the stockyards company was not owned by or in any way connected with the carriers, other than

as above stated, and that no charges were made in addition to the line-haul charge when delivery is taken by the consignee from the unloading pens.

The complainants contended that in addition to the obligation imposed by Section 15(5) upon carriers, a similar obligation was imposed by certain provisions of the tariff above mentioned which made it necessary that shipments be hoof weighed at destination in order to determine the amount of the transportation charge. They argued that since this weighing was a part of the services for which the stockyards made the additional charges in question, all those charges should be borne by the railroads. The railroads contended that under proper construction of the tariff provisions, transportation charges, in the event consignees did not supply hoof weights, could legally be assessed upon track scale weights or prescribed minimum carload weights, and that it was optional with the consignees whether they desired to furnish at their own expense the hoof weights of their stock as the basis for calculation of freight charges. The Commission in its report analyzed the tariff provisions as a whole and construed them in accordance with the railroad's contention. The Commission further found that in the cases in question the railroads had caused the stock to be unloaded at their expense into suitable pens, as contemplated in Section 15(5) and that ample facilities were provided whereby complainants could have taken delivery without additional charge.

Finding that the charges complained of, and for which the complainants prayed reparation, were for stockyard services for which the consignees had paid the stockyards company pursuant to tariffs filed with the Secretary of Agriculture, the Commission said in the final paragraph of its report (R. 35):

We find that the charges assailed are not subject to our jurisdiction. The complaints will be dismissed.

PROCEEDINGS BEFORE THE COURT

The petition (addressed to the Supreme Court of the District of Columbia) (R. 1) sets out the facts substantially as hereinabove stated and states that the Commission made its report and order of dismissal of the relator's complaint after a full and complete hearing (R. 8). The prayer asks that the Commission be compelled by mandamus to award reparation. In the opening paragraph of its brief (Appellant's Brief pp. 1-2) the appellant is in error in describing the object of this action as "a writ of mandamus to compel the Interstate Commerce Commission to take jurisdiction" of its claims against the Cincinnati Stockyards Company and the railroads. Paragraph 5 of the prayer of the amended petition (R. 12-13) shows most clearly that the mandamus sought would go much further than the mere order to the Commission "to take jurisdiction" of the claims, since the language used is that the Court issue mandamus "commanding and directing respondent * * * to fix the amount of damage sustained by relator by reason of the collection of

illegal charges, * * * and to order reparation made therefor.” (Emphasis ours.)

The relator in its petition bases its prayer for mandamus upon the theory that the Commission acted upon erroneous conclusions of law. The alleged erroneous conclusions are (R. 10-11):

(1) That the charges assailed were not subject to the Commission’s jurisdiction. (See report p. 35.)

(2) That under the provisions of the applicable tariff, construed as a whole, it is optional with consignees whether they have freight charges calculated upon the hoof weights obtained at destination or upon track scale or minimum weights of the car, and that its freight charges must be based upon hoof weights only in instances when that information is supplied to the carriers, it being of no concern to the railroads whether the stockyards company or the consignee bears the cost of the weighing (R. 33).

(3) That under Section 15 (5) of the Interstate Commerce Act, as applied to the stock consigned to the relator, the transportation and the limit of the Commission’s jurisdiction was reached when the animals were unloaded into the (suitable) unloading pens, from which the relator could have taken delivery without any charge in addition to the scheduled line-haul tariff charges (R. 34-35).

The relator has attached as exhibits to its petition a copy of the applicable tariff, Exhibit A (R. 14), a copy of the Commission’s report, Exhibit B (R. 29), and relator’s “Petition for Reconsideration and/or

Rehearing" filed with the Commission July 29, 1933, Exhibit C (R. 36).

The Commission in due time filed its answer admitting the allegations of the petition as to the corporate capacity of the relator, certain quoted provisions of the Interstate Commerce Act and the proceedings before the Commission. It admitted that the stockyards company, as agent for the railroads, collected the legal charges for the transportation of relator's stock as provided in the interstate commerce tariffs, but denied that any other charges were collected by the stockyards company as such agent, alleging affirmatively that any and all other charges collected, including those for which reparation was asked, were for stockyard services covered by the stockyard tariff and subject only to the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act. The Commission denied that the stockyards company was a common carrier or was subject to the provisions of the Interstate Commerce Act. It admitted the filing of a motion for reconsideration and the denial thereof, but expressly denied the truth of the statements contained in said motion. Alleging that it made its report and order in the proceeding before it after full hearing and in accordance with the law, the Commission denied that the relator was entitled to the relief prayed or any other relief and asked that the suit be dismissed. To this answer the relator filed a demurrer.

After hearing argument, the Court overruled relator's demurrer. The relator elected to stand upon

said demurrer and the Court thereupon dismissed the case, from which order of dismissal the relator has prosecuted this appeal.

STATUTES

For convenience the following provisions of the Interstate Commerce Act and the Packers and Stock Yards Act are submitted as having a more or less direct bearing upon the issues involved in this case. Here as elsewhere in this brief emphasis is inserted by the writers thereof.

INTERSTATE COMMERCE ACT

Section 6 (7):

No carrier, unless otherwise provided by this Act, shall *engage or participate* in the *transportation* of passengers or property, as defined in this Act, *unless* the rates, fares, and charges upon which the same are transported by said carrier have been *filed and published* in accordance with the provisions of this Act; nor shall any *carrier charge or demand or collect or receive a greater or less or different compensation* for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs *than the rates, fares, and charges which are specified in the tariff* filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 9:

That any person or persons claiming to be damaged by any *common carrier subject to the provisions of this Act* may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the *damages* for which such common carrier may be *liable under the provisions of this Act*, in any district or circuit court of the United States of competent jurisdiction; but *such person or persons shall not* have the right to pursue both of said remedies, and must in *each case elect which* one of the two methods of procedure herein provided for he or they will adopt. * * *

Section 13 (1):

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done *by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof*, may apply to said Commission by petition, which shall briefly state the facts; whereupon *a statement of the complaint* thus made shall be forwarded by the Commission to *such common carrier*, who shall be called upon to *satisfy the complaint*, or to *answer* the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the

time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers *shall not satisfy the complaint* within the time specified, *or there shall appear to be any reasonable ground for investigating said complaint*, it shall be the duty of the Commission to *investigate* the matters complained of *in such manner and by such means as it shall deem proper*.

Section 14 (1):

That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

Section 15 (5):

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner,

or to try an intermediate market, or to comply with quarantine regulations. *The Commission may prescribe or approve just and reasonable rules governing each of such excepted services.* Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

PACKERS AND STOCKYARDS ACT, 1921, 42 STAT. 159

Section 301 (b):

The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, *feeding, watering, holding,* delivery, shipment, *weighing, or handling,* in commerce, of livestock.

Section 304:

It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard. * * *

Section 305:

All *rates or charges* made for any *stockyard services* furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

Section 306 (a):

Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, *the stockyard owner* and every market agency at such stockyard *shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard.* If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

Section 306 (b):

Such *schedules shall* plainly state all such *rates and charges* in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

Section 306 (e):

Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without

complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, * * * .

Section 306 (f):

After the expiration of the sixty days referred to in subdivision (a) no *person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard* have been filed and published in accordance with this section and the orders of the Secretary made thereunder; *nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified* * * * ; nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

Section 307:

It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

QUESTION PRESENTED

Whether the writ of mandamus will lie to compel the Interstate Commerce Commission to make an award of reparation in a proceeding before it wherein it has held a full hearing and decided that the payments for which reparation is sought by claimant were paid to a stockyards' company for yardage services covered by tariffs required by law to be filed with the Secretary of Agriculture under the Packers & Stockyards Act, and not for transportation services under the Interstate Commerce Act, and that there was no obligation upon any of the railroad defendants to pay or assume said payments.

POINTS AND AUTHORITIES

I. The action of the Commission in denying the reparation sought by the relator was correct in law.

1. Transportation ended when the relator's stock was put into the unloading pens. *Southwestern Horse & Mule Assn. v. Atchison, T. & S. F. Ry. Co.*, 129 I.C.C. 730; *Covington Stockyards Co. v. Keith*, 139 U.S. 128.

2. The unloading pens were "suitable" under the terms of Section 15(5) and likewise under the terms of the applicable tariffs.

3. The Commission's finding as to the "suitability" of the unloading pens should be accepted by this court, especially in the absence of the evidence upon which the finding was made. *United States v. New River Co.*, 265 U.S. 533; *Kansas City South. Ry. Co. v. United States*, 231 U.S. 423; *Manufacturers Ry.*

Co. v. United States, 246 U.S. 457; *Int. Com. Comm. v. Union Pac. R.R.*, 222 U.S. 541; *United States v. Louisville & Nashville R.R. Co.*, 235 U.S. 314; *Spiller v. A., T. & S. F. R. Co.*, 253 U.S. 117; *United States v. Tennessee*, 262 U.S. 318; *Chicago, I. & L. Ry. Co. v. United States*, 270 U.S. 287; *Hines v. United States*, 263 U.S. 143, and *Hygrade etc. Corp. v. A., T. & S. F. R. Co.*, 195 I.C.C. 553.

4. The construction of the tariff required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of the incidents affecting their use, and the Commission's interpretation thereof should be accepted by the court. *Adams v. Mills*, 286 U.S. 397, 409; *Standard Oil Co. v. United States*, 283 U.S. 235; *Great Northern Ry. v. Merchants Elev. Co.*, 259 U.S. 285; *Texas & Pac. Ry. v. Am. Tie Co.*, 234 U.S. 138; and *Loomis v. Lehigh Valley R.R.*, 240 U.S. 43.

5. The transfer of relator's stock into the holding pens constituted delivery to it.

II. Mandamus is not a proper remedy.

1. Mandamus cannot be used to correct error in an action of the Commission. *Bartlesville Zinc Co. v. Int. Com. Comm.*, 30 F. (2d) 479; *Int. Com. Comm. v. Capital Grain Co.*, 35 F. (2d) 1012; and *Int. Com. Comm. v. U.S. ex rel. Arcata & Mad River R. Co.*, 65 F. (2d) 180.

2. The award of reparation involves the exercise of a discretion conferred by law upon the Commission alone, and the courts will not by mandamus compel

the Commission to make such award. *Int. Com. Comm. v. U.S. ex rel. Campbell*, 289 U.S. 385; *Standard Oil Co. v. United States*, 283 U.S. 235.

3. Mandamus lies to compel the Commission to make a decision. *Int. Com. Comm. v. Humboldt Steamship Co.*, 224 U.S. 474; *U.S. ex rel. Louisville Cement Co. v. Int. Com. Comm.*, 246 U.S. 638; *U.S. ex rel. Kansas City South. Ry. Co. v. Int. Com. Comm.*, 252 U.S. 178. But not to compel it to decide in a particular way. *Int. Com. Comm. v. U.S. ex rel. Arcata & Mad River R. Co.*, 65 F. (2d) 180; *U.S. ex rel. Chicago Great Western R. Co. v. Int. Com. Comm.*, 71 F. (2d) 336.

ARGUMENT

I

THE ACTION OF THE COMMISSION IN DENYING THE REPARATION PRAYED BY RELATOR WAS CORRECT IN LAW

While the Commission's position is that in no case can it be compelled by mandamus to award reparation, it submits that the lower court did not err in dismissing the relator's petition for the additional reason that the law and the facts before the Commission justified the Commission's action. It is well settled that a petitioner praying the extraordinary remedy of mandamus must show that he is entitled to the ultimate relief he seeks. *Detroit, T. & S. L. R. Co. v. Int. Com. Comm.*, 277 Fed. 535, 537. Hence we discuss first the correctness of the Commission's action upon the relator's complaint.

1. **The Commission was correct in holding that the transportation of the relator's stock was completed when the animals were driven from the cars into the unloading pens**

Section 15 (5) of the Interstate Commerce Act (*supra* p. 13) requires the carriers to include in their transportation services of ordinary livestock consigned to public stockyards, the delivery of the animals into suitable pens, without extra charge. In the case at bar, it appears from the Commission's report (the only available source of information as to the facts), that the railroads have arranged with the stockyards company for the driving of the stock from the cars into the unloading pens, the railroads paying the stockyards company for the service and for the use of the unloading pens. The railroads have no arrangements with the stockyards company for the use of that company's scales or holding pens. Some consignees take their shipments from these unloading pens to the street and do not have to pay any extra charge for the privilege of egress. But the relator has not seen fit to take delivery in this way, and for its own convenience has had its stock transferred from the unloading pens to the holding pens where the animals remain for such length of time as suits relator. The relator does not claim that it was not aware of the privilege of taking possession of its stock at the unloading pens and thereby avoiding payment of any extra charge to the stockyards company. In any event the stockyards tariff filed with the Secretary of Agriculture pursuant to Section 306a of the Packers & Stockyards Act

(*supra*, p. 15) would put the relator upon notice of this privilege even though it should claim to be unaware of it. The relator's contention in this case is that it is entitled not merely to the delivery of its shipments into the unloading pens from which it may take its stock without payment of any charges in addition to those prescribed in the interstate commerce tariffs for transportation, but that it is further entitled, at the expense of the railroads, to the strictly yardage services of the weighing, feeding and holding of its stock in the holding pens for various periods of time as desired by it.

In the portion of its report bearing upon this point the Commission refers to its report in *Southwestern Horse & Mule Assn. v. Atchison, T. & S. F. Ry. Co.*, 129 I.C.C. 720, wherein a similar situation was presented to it relative to conditions at Ft. Worth, Texas. This Ft. Worth case was the first case before the Commission involving the application of the then newly enacted paragraph (5) of Section 15 of the Act, above referred to. In its report the Commission also discusses the doctrine laid down by the Supreme Court in *Covington Stockyards Co. v. Keith*, 139 U.S. 128, and shows that its construction of the law relative to the handling of livestock is in entire harmony with the doctrine of the *Keith case*.

The Commission said with reference to the Ft. Worth case above referred to (R. 34):

* * * In *Southwestern Horse & Mule Assn. v. Atchison, T. & S. F. Ry. Co.*, 129

I.C.C. 730, a yardage charge on horses, mules, burros, and asses collected at the public stockyard in North Fort Worth, Tex., by the Fort Worth Stock Yards Company was assailed as unreasonable. This charge was made for the use of the stockyard facilities from the time the animals were taken out of the unloading pens, and for the services rendered, except unloading. In that case it was shown that for several years the line-haul carriers had maintained individual pens and other stockyard facilities at Fort Worth some 2 to 4 miles from the public stockyards that had been and were accessible to and adequate for the traffic under consideration, and that no yardage charge was made for the use of such facilities. We there expressed the view that transportation of ordinary livestock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards and that this marks the limit of our jurisdiction over such shipments. We found that we were without jurisdiction to determine the issues respecting the yardage charges assailed. In that case, as in the instant case, adequate and accessible facilities were provided whereby the consignees could take delivery without additional charges.

It will be noted that the free delivery at Ft. Worth was available only at individual pens and other stockyards facilities "some 2 to 4 miles from the public stockyards"; whereas at Cincinnati the free delivery offered is immediately from the unloading pens at the public stockyards, a situation much more favorable to shippers than at Ft. Worth.

2. The unloading pens at Cincinnati into which relator's consignments of livestock were put were suitable pens as required by Section 15 (5) of the Interstate Commerce Act

On page 11 of relator's brief it is asserted that the unloading pens were not suitable pens.

The tariff, which by law constitutes the contract between the relator and the railroads, provides (Rule 23 (h), R. 24) that the term "suitable pens" as used in rule 23, a (1) of the tariff (R. 20) means "pens into or from which ordinary stock is loaded, unloaded or reloaded directly from or to the car." The unloading pens in question undeniably come within the specifications of the tariff above quoted, especially when it is remembered that the railroads pay the stockyards company for the unloading into and for the use, of the pens, and consignees may, if they desire, take delivery therefrom without any yardage charge.

With reference to the situation at Cincinnati, the Commission said (R. 30):

* * * The livestock is unloaded over a platform through chutes into so-called "unloading pens" which measure 688 square feet or twice the capacity of a 40-foot car. A few of these pens have facilities for watering, but not for feeding, livestock. In certain instances livestock has been taken direct from these unloading pens. The record does not show that these pens are not suitable for unloading purposes, and there is no contention that the way of egress is unfit. * * * No additional charge is made if the livestock

is removed by consignees from the unloading pens before it is weighed, * * *. (192 I.C.C. 706.)

The Commission further in its report referred to its action in *Southwestern Horse and Mule Asso. v. A., T. & S. F. Ry. Co.*, 129 I.C.C. 730, relative to practices at North Fort Worth, Texas, and comparing the respective facilities, said (R. 35):

* * * In that case, as in the instant case, adequate and accessible facilities were provided whereby the consignees could take delivery without additional charges. (192 I.C.C. 710.)

The Commission made the finding that the unloading pens were suitable, with the evidence taken at a "full hearing" before it. Without submitting any evidence, the relator asks this court to make a contrary finding. Aside from the conclusiveness of the Commission's findings (which will be discussed later in this brief), we submit that in the absence from the record in this court of all the evidence considered by the Commission, this court should not make the finding asked by relator.

The use by Congress in Section 15 (5) of the Interstate Commerce Act of the indefinite word "*suitable*" in describing the pens into which carriers were required to unload livestock, confers upon the Commission the power and imposes the duty of construing the word in its application to any given state of facts.

The courts have held:

(a) That the courts will not review the determinations of the Commission made within the scope of its

authority and based upon substantial evidence. *United States v. New River Co.*, 265 U.S. 533; *Kansas City South. Ry. Co. v. United States*, 231 U.S. 423; *Manufacturers Ry. Co. v. United States*, 246 U.S. 457; *Int. Com. Comm. v. Union Pac R.R.*, 222 U.S. 541; *United States v. Louisville & Nashville R.R. Co.*, 235 U.S. 314.

(b) That a court will not consider whether the record before the Commission contained substantial evidence to sustain the finding unless the entire record is before it. *Spiller v. A., T. & S.F. R. Co.*, 253 U.S. 117; *United States v. Tennessee*, 262 U.S. 318; *Chicago, I. & L. Ry. Co. v. United States*, 270 U.S. 287; *Hines v. United States*, 263 U.S. 143.

The cases above cited involve numerous questions of "reasonableness" and are conclusive, we submit, of this case in so far as it involves the Commission's determination of what constitutes a "suitable pen."

In the face of the cases above cited, the relator contends that because the unloading pens have no facilities for feeding stock in them, this court should overrule the Commission in its conclusion that they were "suitable." Relator asserts that stock cannot be held a reasonable time in said unloading pens for delivery therefrom. Of course, it is for the Commission to determine the reasonable time the stock should be held for delivery at the unloading pens, and there is nothing in this record to indicate that such reasonable time has not been allowed in all cases. But the question of whether the stock could be left for a reasonable time in unloading pens is

not involved in this case. Such question here is moot. The relator does not contend that it desired to take possession of its shipments at the unloading pens and that because it was not allowed a reasonable time, was compelled to utilize the holding pens at extra expense. On the contrary, the relator desired its stock weighed and held for the convenience of its packing plant. Hence the alleged failure of the railroads to provide in the tariff for a reasonable stay of animals in the unloading pens has neither support in the evidence nor bearing upon the issues in this case. Upon the record, shippers who desired to take possession of their stock from the unloading pens were allowed a reasonable time within which to do so. For years stock had been so taken and no complaint is shown to have been made by relator or any one else as to the time allowed in the holding pens. Clearly, relator should not now be heard to set up such objection, even if it were well founded—a conclusion not in any way supported by the record in this case.

The suitability of pens under the statute is, in the opinion of the Commission, dependent upon two considerations, their physical characteristics and their accessibility. Thus a pen which is adequate in size and properly constructed may be unsuitable because it does not afford a means by which the consignee may remove his stock without payment of an additional charge.

In *Hygrade etc. Corp. v. A., T. & S. F. R. Co.*, 195 I.C.C. 553, the Commission had under consideration

the situation at the Chicago Union Stock Yards where a consignee which took its stock directly from the unloading pens had to pay the stockyards company a charge for the use of the alley-ways of the stockyards company from the unloading pens to the public street. It was held that in such case the railroad had unloaded the stock into pens which, although physically adequate, were "*unsuitable*" in the sense that free egress could not be had therefrom. This being a violation of Section 15 (5) by the railroad, the effect of which was to compel the consignee to expend money in addition to his line-haul charges, the Commission awarded reparation against the railroad. It will be noted that Commissioner Lee in a dissenting report takes the position that only the physical features of the pens need be considered and that since those at Chicago were large enough and otherwise physically adequate, they should be held to be "*suitable*" as required by the statute. The Commission, however, *held that free egress from the unloading pens* (lacking at Chicago but available at Cincinnati) was essential in order for unloading pens to be "*suitable*" under the statute.

3. The applicable tariff, Exhibit A to the amended petition, does not require the hoof weighing of relator's consignments at the expense of the railroads

The relator further contends that in addition to the obligation which it says is imposed by Section 15 (5), the railroads are obligated to pay the yardage charges by reason of certain language to be found in

the railroads' "*Instructions relative to the Transportation of Livestock and Live Poultry*", a manual for the use of agents and for the information of shippers in connection with the handling of livestock. These instructions having been filed as an I.C.C. tariff are binding upon both carriers and shippers. It will be noted, however, and should be borne in mind, that this tariff is obviously not the only tariff governing the movement of livestock. Rates to be charged and other applicable considerations are expressed in other tariffs which are not in this record.

The relator puts its reliance upon a single clause in Rule 16 of the instructions, which provides that "Where proper facilities are provided at destination for obtaining hoof weights, the weights so obtained after the stock has been fed and watered, will be the proper basis for assessing freight charges * * *."

The tariff nowhere expressly puts upon the railroads the duty of hoof weighing the stock. The weighing of individual items of a carload shipment in order to ascertain a basis for calculating the freight charge is contrary to the well-known practice, which is to use the car scale weight or the prescribed minimum carload rate. This is the practice at Cincinnati, when stock is taken from the unloading pens by the consignee. The relator, however, contends that under the tariff the freight charges on livestock can be calculated only upon the hoof weights—the aggregate weights of individual animals—and argues that therefore the carriers are obligated to pay for having the stock hoof weighed. We submit that relator's posi-

tion is unsound. The provisions of Rule 16 of the tariff are as follows (R. 18):

HOOF WEIGHTS AND SHRINKAGE ALLOWANCES

a. *In no case will the charges be collected on less than the established carload minimum weight.*

b. Where proper facilities are provided at destination for obtaining hoof weights, the weights so obtained after the stock has been fed and watered, will be the proper basis for assessing freight charges, with the following fill allowances: * * *

* * * * *

e. *All weights furnished at market points (see Rule 15, page 16), will be subject to verification by the carriers.*

f. (1) *Where arrangements are not made at destination for the use of certified hoof selling weights as a basis for determining freight charges, or*

(2) *Where shipments move between stations (not markets) upon which actual weights are not obtainable, then*

(3) *The track scale weights of cars loaded and empty will be used to determine freight charges.*

(4) *Corrections, however, will be made from track scale weight to the certified hoof selling weight when supplied by consignee, if such weight is greater than the net track scale weight by more than 500 pounds per car. (See paragraph "a.")*

g. (3) *In the event of the hoof selling weights cannot be obtained the carrier must track scale the car empty and loaded and use weights so ascertained for the collection of freight charges.*

NOTE.—The term “*hoof weights*” as used herein signifies “*hoof selling weights*” when “*hoof selling weights*” are obtained.

h. *When weights under the foregoing rules cannot be obtained at origin or destination shipment will be subject to paragraph “a.”* (Emphasis ours.)

The Commission thus disposed of the relator's contention (192 I.C.C. 709, R. 33):

Rule 16 (b) of the tariff declares that “Where proper facilities are provided at destination for obtaining hoof weights, the weights so obtained after the stock has been fed and watered, will be the proper basis for assessing freight charges,” subject to certain enumerated fill allowances; and that “if the stock has not been fed and watered, destination hoof weight will be used without deduction for fill.” *This tariff does not expressly declare that the stock shall be hoof weighed at destination.* Moreover, to sustain complainants' interpretation would render meaningless paragraph (e), which provides in effect that all weights furnished at Cincinnati will be subject to verification by the carriers. In additional support of the view that this tariff provides merely an alternative method of determining the freight charges, defendants refer to paragraph (f) wherein it is stated that *where arrangements are not made at destination for the use of hoof weights*, or where shipments move between stations (not markets) upon which actual weights are not obtainable, then the track-scale weights of cars loaded and empty will be used to determine the freight

charges. Paragraph (h) specifies that when weights under the foregoing rules can not be obtained at origin or destination the shipment will be subject to paragraph (a) which provides that in no case will charges be collected on less than the established carload minimum weight. *Consideration of the various provisions of defendants' tariff relative to weighing leads to the conclusion that their contention should be sustained.* [Emphasis ours.]

In addition to the consideration of the tariff "from its four corners", as is shown by the above quotation from the report, the Commission construed the tariff with relation to all the surrounding circumstances and conditions and made its decision upon more than the bare verbiage of the tariff. In such case the ultimate conclusion of the Commission upon the point (in this case, whether the railroads are obligated by law or contract to pay the cost of having relator's stock weighed) is entitled to more weight than in case of the cold legal question of the construction of a written instrument.

It is well established that if the construction of a tariff involves more than a mere determination of the meaning of ordinary words and also involves the consideration of extrinsic evidence, a resort must be made to the Commission for the effect of the tariff and the Commission's construction will be accepted by the courts. This is true with respect to many questions which arise within the scope of the Commission's peculiar functions. See *Great Northern Ry. v. Merchants Elev. Co.*, 259 U.S. 285.

Other questions which must be submitted to the Commission whose determination will not be questioned by the courts are:

Whether a tariff governing the transportation of "lumber" applies to wooden railroad cross ties. *Texas & Pac. Ry. v. American Tie Co.*, 234 U.S. 138.

Whether certain car distribution rules filed as tariff schedules were reasonable and proper. *Baltimore & Ohio R.R. Co. v. Pitcairn Coal Co.*, 215 U.S. 481; *Morrisdale Coal Co. v. Penn. R.R. Co.*, 230 U.S. 304; *Midland Valley R.R. v. Barkley*, 276 U.S. 482.

Whether carriers are obligated to construct inside doors or transverse bulkheads in its box cars for the shipment of grains, apples, cabbages and potatoes. *Loomis v. Lehigh Valley R.R.*, 240 U.S. 43.

Whether a rate exacted by a railroad for transportation was unreasonable. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426.

Whether payments by a railroad to a rival shipper alleged as prejudicial by plaintiff are unreasonable. *Mitchell Coal Co. v. Penna. R.R. Co.*, 230 U.S. 247.

Whether it was the duty of a railroad to forward unrouted shipments via an intrastate route with heavy grades, but at a lower rate, or forward by an interstate route at a higher rate, because of established practice and conditions peculiar to the interstate route. *Northern Pac. Ry. Co. v. Solum*, 247 U.S. 477.

Whether a regulation put into effect as a part of a tariff filed by a railroad company, wherein it declares that a certain commodity "will not be

accepted for shipment" is a reasonable one. *Director General v. Viscose Co.*, 254 U.S. 498.

In the cases above cited, the respective plaintiffs attempted to submit the questions involved directly to the courts, which refused to make the determination. In view of the technical nature of the question the Commission's conclusion as to the proper practice under the tariff should be accepted by this court.

In *Standard Oil Co. v. United States*, 283 U.S. 235, a mandatory injunction was sought in the lower court to compel the Commission, to enter an order granting the prayer of said complaints for reparation, to find that the petitioner has been overcharged by an amount equal to the difference between the rates assessed by said defendant carriers and the rates found to be lawfully applicable to said petitioner's shipments, and to order a further hearing, if necessary, for the purpose of determining the amount of money to be paid by the defendant carriers to petitioner by way of reparation. The contention was that the tariff schedules should be so construed as to make applicable a lower rate than that charged. The Court said (p. 238-240):

Second. The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use. It is evident

from an inspection of the record, as the Commission in its first report said, that "both cases concern unusually complicated and technical tariff situations," the proper determination of which called for the exercise of the trained judgment of that body of experts, "appointed by law and informed by experience." *Illinois Central R. Co. v. Interstate Commerce Comm.*, 206 U.S. 441, 454. And to that body, in the interest of uniformity, the determination must be left.

In *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291-292, this court held that to determine whether a rate is reasonable for the future, or whether a shipper has been wronged by the exaction of an unreasonable or discriminatory rate in the past, preliminary resort to the Commission is required.

"It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

Then, after pointing out that resort to extrinsic evidence is sometimes necessary to establish the meaning of words appearing in a written instrument, in which case the function of construction is preceded by the determination of a matter of fact, the court said that

“ * * * where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained.”
[Emphasis ours.]

In *Adams v. Mills*, 286 U.S. 397, the Commission had made an award of reparation for a 25-cents per car charge exacted by the Chicago Union Stock Yards for unloading ordinary livestock. The Commission, dealing with the legality of this charge in *Chicago Live Stock Exchange v. Atchison, T. & S.F. R. Co.*, 52 I.C.C. 209, in February 1919 (before the enactment of Section 15 (5)) held that the charge was reasonable and should be paid by the shipper and not absorbed by the railroads. On petition the Commission reopened the proceeding for further hearing and in July 1920, 58 I.C.C. 164 (after the enactment of Section 15 (5)) held that “it was the duty of the

carrier to unload and load livestock" at the stock-yards in Chicago. The Commission further ordered the railroads to make reparation to shippers as to the loading and unloading fees they had paid. The case of *Adams v. Mills*, *supra*, was an action by shippers upon these orders of reparation. With respect to the construction of tariffs, the Court said (p. 409-410):

The defendants challenge the Commission's holding that the extra charge of 25 cents made to the shippers was an unlawful practice. The conclusion rests upon the findings that the Stock Yards are, in effect, terminals of the line-haul carriers; and that the service of unloading the livestock there is a part of transportation. That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so. *Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 294. *The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. Atchison, T. & S. F. Ry. Co. v. United States*, 232 U.S. 199, 221; *Los Angeles*

Switching Case, 234 U.S. 294, 310, 311.
[Emphasis ours.]

Under the rule stated in the above-cited cases the question of the obligation of the carriers in the case at bar to pay the cost of hoof weighing relator's stock is obviously not a pure question of law to be determined merely by the reading of the tariff in question. As in the cases cited, the Commission has had before it and considered numerous pertinent facts, including the history of the stockyards and their practices, their relations with the railroads, the absorption of service charges, and the actions and attitudes of shippers and carriers in relation thereto. Wherefore we submit that the Commission's conclusion should be sustained by this court.

4. The removal of relator's stock from the unloading pens constituted delivery and ended the transportation thereof

In its brief (p. 4) the relator states as one of its points of law that "transportation does not end until there is a delivery to the consignee at point of destination." In its argument upon this point (appellant's brief pages 8-9), it is asserted that Section 15 (5) of the Act "means something more than mere unloading from the cars," and that transportation under the Act cannot be held to have ended until the stock had been weighed, driven into the holding pens, and actually taken possession of by the consignee. This construction of Section 15 (5) is obviously incorrect when it is remembered that the provision applies only to stock destined to public stockyards where by long established practice the

employees of the stockyards perform the actual handling of the animals. It was clearly the purpose and intention of the statute to impose upon the railroads the duty only of seeing that the stock was unloaded from its cars into (suitable) unloading pens, and obviously contemplated that the stockyards company, *acting on behalf of the consignee*, should remove the stock from the unloading pens for disposition in accordance with instructions given it by the consignee.

The relator reaches the conclusion that delivery of its stock had not been accomplished and the transportation ended until after the animals had been weighed and put into the holding pens, by means of two erroneous premises: (1) That the unloading pens were not "suitable" under the statute, and (2) that the freight charges could not legally be assessed without hoof weighing the consignment. The Commission has held that the conditions of neither premise exist and we have hereinabove, we submit, demonstrated the soundness of the Commission's conclusions upon these points.

The relator, on page 9 of its brief, cites the case of *Covington v. Keith, supra*, and quotes certain language from the opinion. Relator emphasizes the portion of the quotation reading, "the transportation of livestock * * * ends only after the stock is *unloaded and delivered*." Relator, however, omits to stress the clause immediately following, which reads, "*or offered to be delivered*" to the consignee. Upon the record here, it is clear that relator's

shipments were "offered" to it at the unloading pens, and that it could have taken them therefrom without extra cost, as other consignees have done. Nor is there any evidence of difficulty in connection with the calculation of freight charges upon stock delivered without hoof weighing. In the Commission proceeding neither the complaining shippers, the stockyards company, nor the railroads suggested that relator's stock was taken out of the unloading pens by the stockyards company and put into the holding pens because relator, owing to lack of notice, had failed to take possession at the unloading pens within a reasonable time. All parties recognized the fact that as to shipments consigned to relator and the other packing house operators, the long established practice required the stockyards people to hoof weigh and drive the stock into holding pens to be held there as long as desired by consignees. For these services the consignees paid the stockyards company without question. As we have hereinabove pointed out, the railroads had no contract with the stockyards company for any handling of the animals other than the driving from the cars into the unloading pens.

It is clear, therefore, that in hoof-weighing the animals putting them into the holding pens, and in feeding, watering, and retaining them, the stockyards company acted as agent for the relator and the other packers whose stock was so handled. Common knowledge of the business of public stock yards is sufficient to negative any suggestion of impropriety

or illegality in such dual agency. In driving the stock from the cars into the unloading pens, the stockyards company was employed by and was the agent of the railroads. Beyond that point it was employed by and was the agent of the consignees.

Hence, there was *actual delivery* to the relator upon removal of relator's stock from the unloading pens in the custody of relator's agent, the stockyards company. Transportation, therefore, ended at the gates of the unloading pens, and we submit that relator's reliance upon the question of delivery can avail it nothing.

II

MANDAMUS CANNOT BE USED AS AN APPEAL OR WRIT OF ERROR TO COMPEL THE COMMISSION TO MAKE AN AWARD OF REPARATION

1. Mandamus will not lie to correct error in action of the Interstate Commerce Commission

The petition alleges that the Commission committed error in its decision in the case before it and seeks to correct that error by mandamus. It is well settled that such relief cannot be so secured. In the proceeding before the Commission, as has been pointed out above, the Commission took jurisdiction of the complaint and held a full hearing, deciding the issues of fact which arose, with the result that the relief prayed was denied because of a conclusion that under the law the Commission could not legally require the repayment of money exacted by a stockyards company for yardage services. In *Bartlesville*

Zinc Co. v. Interstate Commerce Commission, 30 F. (2d) 479, this court said (p. 480):

* * * it is conceded that the Commission took jurisdiction of the company's complaint and after hearing testimony and argument concerning the issue, considered and decided it upon the merits. The Commission accordingly fully exercised its jurisdiction, and its decision, whether correct or not, was regularly entered. It was, therefore, not erroneous for the lower court to refuse a writ of mandamus as sought by the company; *for the writ, if granted, could have had no other effect than to review the decision which the Commission had reached upon its consideration of the facts and the law in controversy.* (Emphasis ours.)

In *Donner Steel Co. v. Interstate Commerce Commission*, 285 Fed. 955, this court, although intimating that it considered the conclusion reached by the Commission to be erroneous in law, unhesitatingly declined to interfere by mandamus with the Commission's action.

This court in *Interstate Commerce Commission v. Capital Grain Co.*, 35 F. (2d) 1012, said (pp. 1013-1014):

The finding of the Commission * * * is a finding based upon the facts adduced in the investigation by the Commission; and however erroneous such a finding may be, or inconsistent with a just and equitable administration of the Interstate Commerce Act, it is nevertheless a ruling made by the Commission

in the exercise of its quasi judicial descretion which cannot be controlled by mandamus.

It will be noted that the prayer of the complainants in each case calls for a definite finding by the Commission, which amounts to an award of reparations based upon the extent of the alleged unreasonable and unjust charges which had been exacted from the petitioners. The discretionary power of the Commission in determining whether or not reparation shall be made and damages awarded cannot be controlled in this proceeding, inasmuch as the Commission is not bound by any fixed rules in determining the extent of the damage. While the unreasonable and unjust charges exacted from a shipper are a proper measure of damage (*So. Pac. Co. et al. v. Darnell-Taenzer Lumber Co. et al.*, 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451), the Commission may, in assessing damages, compute interest as a proper element (*Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 46 S.Ct. 73, 70 L.Ed. 242), or the Commission may take into consideration other elements which would furnish a different standard for an award of damages. Thus it appears that the order entered by the court below would operate to control the discretion of the Commission in a purely arbitrary manner based upon a single finding of fact, which the Commission in the free exercise of its judgment and discretion might find not to be controlling.

From the above it is clear that mandamus will not serve as a writ of error, even though it should appear

to the trial court that the Commission committed error in its action in denying reparation.

2. **The award of reparation involves a discretion conferred by law solely upon the Commission, from which tribunal no general right of appeal to the courts is provided, and a court will in no case take such action as would compel an award by the Commission against its judgment, or amount to an award of reparation by the court**

The prayer of the petition is that the Commission be compelled to take jurisdiction and make an award of reparation. It was necessary for the relator to include in its prayer the award of reparation in addition to the taking of jurisdiction, because otherwise the writ if granted would be useless. Mandamus will not lie to compel the doing of a useless thing. In order to justify the issuance of the writ, the relator must show that the granting of his prayer would result in effectual relief. See *In Re Welch Manufacturing Co.*, 201 Fed. 519; *United States v. Lapp*, 244 Fed. 377; *United States ex rel. Widenmann v. Colby, Secretary of State*, 265 Fed. 998.

Therefore, the relator has added to its prayer that the Commission be compelled to take jurisdiction of its complaint (the Commission asserts that it has taken jurisdiction and heard the same) the further prayer that the Commission be compelled to make an award of reparation.

Nothing in the law is better settled than that mandamus will not lie to compel the Commission to award reparation. See *Interstate Commerce Com-*

mission v. United States ex rel. Capital Grain Co., 35 F. (2d) 1012, cited above.

In the recent case of *Interstate Commerce Commission v. United States ex rel. Campbell*, 289 U.S. 385, the Commission had found that certain freight rates were in violation of the Interstate Commerce Act because they were unduly prejudicial to the complainant, and had ordered the prejudice removed for the future. The Commission, however, declined to award reparation, saying that the record would not support the award. The complainant sought to compel the Commission by mandamus to make an award of reparation and to ascertain its damages, arguing that it having been shown that it had been paying unlawful freight charges upon its shipments and that its business had been prejudiced by preferential rates to competitors, it was in law entitled to reparation. The District Supreme Court dismissed the petition. This court, upon appeal, found with the relator and held that the writ should issue. (63 F. (2d) 358). The case went to the United States Supreme Court upon certiorari and in its opinion, referring to the complaint which, as in the instant case, prayed an award of reparation, the Supreme Court said (p. 388):

* * * In dismissing such a complaint, the Commission speaks with finality. Its orders purely negative—negative in form and substance—are not subject to review by this court or any other. *Standard Oil Co. v. United States*, 283 U.S. 235; *Alton R. Co. v. United States*, 287 U.S. 299; *Procter & Gamble Co. v. United States*, 225 U.S. 282; *Baltimore*

& *O. R. Co. v. Brady, supra.* Damages for discrimination denied by the Commission are not recoverable somewhere else.

Even though as contended by the relator in the case at bar the Commission had committed an error of law in its construction of the tariffs, the Interstate Commerce Act, or of the Packers and Stockyards Act, mandamus will not lie to correct it. In the Campbell case above cited, the Supreme Court further said (pp. 393-394):

* * * Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact. If the Commission had declined to listen to the claim for reparation, or finding reparation due, had declined to order payment, mandamus might have been available to hold it to its duty. That is not what happened. The Commission heard the complaint and proceeded to a decision. If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action. *Interstate Commerce Commission v. Waste Merchants Ass'n*, 260 U.S. 32, 34; *Wilbur v. Kadrie*, 281 U.S. 206, 218; *Interstate*

Commerce Commission v. N.Y., N.H. & H. R. Co., 287 U.S. 178, 204.

Obviously having in mind the provision of Section 9 of the Interstate Commerce Act that a person claiming to be damaged by a common carrier must elect whether to prosecute his claim through a proceeding before the Commission or one before the courts and that he may not pursue both remedies, being required in each case to elect which one of the two methods of procedure he will adopt, the Court in the same case further said (p. 394):

The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts. *Standard Oil Co. v. United States*, *supra*; *Alton R. Co. v. United States*, *supra*; *Proctor & Gamble Co. v. United States*, *supra*; *B. & O. R. Co. v. Brady*, *supra*. A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct review. *I. C. C. v. Waste Merchants Ass'n*, *supra*, p. 35. There have been like attempts before in other branches of the law of remedies. *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Missouri Pacific Ry. Co. v. Fitzgerald*, 160 U. S. 556, 581. They have met with no success.

In this case the relator, though it originally elected to present its claim to the Commission, seeks now to have the court consider the facts and the law upon which it bases its claim and to compel the Commission to register the conclusions and

decision of the court. The relator is clearly attempting to have both the Commission and the court pass upon its claim. That the courts will look behind the form of the action or the special relief asked, and will act in accordance with the law applicable to the real purpose of the suit, is held in *Standard Oil Co. v. United States*, 283 U.S. 235, in which suit was brought under the Urgent Deficiencies Act to set aside and enjoin an order of the Commission denying a claim for reparation. The Court said (p. 241):

* * * Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure. Compare *Geo. A. Hormel & Co. v. Chicago, M. & St. P. Ry. Co.*, 283 Fed. 915, 918.

It is true that appellant sought to enjoin and set aside the order of the Commission, but only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission. This is made clear by the prayer of the petition, already quoted, namely, that the Commission be directed by the court to grant the prayer of the complaints; find that petitioner has been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation. It is of no importance that the adjudication sought is to take the form of a direction to the Commission to

grant the prayer of the complaints filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection. In substance and in principle the claim before the Commission and the claim before the court were the same, and the district court was without authority to entertain the controversy. * * *

CONCLUSION

Since the organization of the Interstate Commerce Commission, numerous mandamus suits have been brought against it and in only three instances has a court of last resort approved of the issuance of a writ. The cases are:

Interstate Commerce Commission v. Humboldt Steamship Co., 224 U.S. 474, wherein the Commission declined to consider a complaint as to freight rates in Alaska because it thought Alaska was not a territory of the United States within the meaning of the Interstate Commerce Act.

United States ex rel. Louisville Cement Co. v. Int. Com. Comm., 246 U.S. 638, wherein the Commission declined to consider a complaint upon the ground that being made more than two years after the shipment moved, it was barred by a special statute of limitation. The court held that the statute ran from the date of payment of the objectionable charges, and, therefore, was barred.

United States ex rel. Kansas City Southern Ry. Co. v. Int. Com. Comm., 252 U.S. 178, wherein the Com-

mission refused in a valuation proceeding to attempt to ascertain and report cost of condemnation, etc., of carrier's lands, though expressly directed by statute to do so.

In the case last cited the Commission declined to comply with a direct mandate of the statute. In the first two it declined to act, because of erroneous conclusions of law upon questions apparent on the face of the complaint. In each case the mandamus order made final by the Supreme Court was merely that the Commission hear and decide the case before it. The order did not direct how any issue should be decided, nor was there any preliminary question to be decided.

The fact that in the case at bar the mandamus sought would require the decision of the Commission to be that reparation should be awarded, of itself distinguishes the instant case from the three above cited and brings it within the scope of those referred to earlier in this brief, which hold that mandamus will not lie to direct the Commission how to decide an issue or to serve as a writ of error or appeal from the Commission to the court.

A recent case bearing upon the issues here involved is *Interstate Commerce Commission v. United States ex rel. Arcata & Mad River R.R. Co.*, 65 F. (2d) 180, where this court considered an application for a writ of mandamus to compel the Commission to ascertain the amount of deficit sustained by the relator in its railway operations during the period of Government control and to issue a certificate which would

cause the Secretary of the Treasury to repay such deficit under Section 204 of the Transportation Act. The Commission's jurisdiction was by statute limited to railroads engaged in general transportation and the Commission had found that the relator was not engaged in transportation but that it was a logging road built and operated primarily to transport timber of a lumber company to the lines of connecting carriers. The Commission also found that the company during the period had carried its owner's timber at unreasonably low prices and that the deficit claimed was the result in part of self-imposed losses.

In its opinion that mandamus would not lie, this court said:

If the decision of the Commission had been grounded solely on the fact that appellee was not a "carrier" within the intent of the act, and if because of that finding it had refused to consider the claim and had based its refusal on that ground, and if the admitted facts had shown that this conclusion was incorrect, a stronger case would perhaps be presented, *though we are disposed to think we should have to hold even in such a case that the dismissal of the claim was a decision on the merits rather than a dismissal for lack of jurisdiction and therefore was not within the doctrine of I.C. Commission v. Humboldt Steamship Co., 224 U.S. 474, where mandamus was held proper to require the Commission to take jurisdiction and hear the controversy on the merits.* But we are not confronted with that question here, for that is not the record we are dealing with.

As we have seen, the Commission, while at one point in its report expressing "grave doubt" as to whether appellee was a carrier and at another point saying it was not, did in fact, as is shown by their report, proceed to decide the case on the whole merits as fully as if it had reached a different conclusion on the first question. In other words, the Commission decided and reported that appellee was not entitled to the certificate not only because it was not a "carrier", but also because it had by its own act and in the interest of its owner, the lumber company, reduced its rates, as a result of which, alone, it was able to show not a real but a fictitious deficit. It is quite true that in reaching this conclusion the Commission had recourse to a definition of the word "deficit", the correctness of which is disputed by appellee, but this is just another argument in favor of the conclusion that the Commission decided the case on the merits rather than on a mistaken theory of lack of jurisdiction.

From all of this it is not difficult to see that the subject matter of this application for mandamus is not really the refusal of the Commission to act but more correctly whether the Commission's action is right or wrong. If in such circumstances mandamus should issue, it necessarily would have the effect of a writ of error, and if this be true, we do not need to cite authority to show that this may not be done. (Emphasis ours.)

In the still more recent case of *United States ex rel. Chicago Great Western Railroad Company v. Int. Com. Comm.* (May 7, 1934), 71 F. (2d) 336, this court considered a case wherein the Commission had held that it lacked authority in law to compel the railroad companies which were joint proprietors in the Kansas City Union Terminal, to rewrite their contract of association so that the cost to some of the participating railroads would be reduced to a figure more in proportion to the amount of use enjoyed by the particular road. In its report the Commission had stated that the power and authority it was asked to exercise were not conferred upon it by the statute and "we are unable to spell out from that provision such a jurisdiction." This expression, the relator contended, constituted an erroneous denial of jurisdiction by the Commission and justified the issuance of a writ of mandamus to compel the Commission to grant the relief prayed. In holding that mandamus would not lie, this court said:

* * * These statements they [relators] say indicate the view of the Commission that it was without jurisdiction. But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask.

We point out that the above language very aptly describes the case at bar. The "jurisdiction", the lack of which the Commission referred to in the last

paragraph of its report (R. 35), is not a lack of jurisdiction to hear and decide the relator's right to receive from the railroad companies the yardage charges it had paid the stockyards company, but a lack of legislative authority to order repayment by the stockyards company, the Commission having already heard and considered the case fully and determined that the railroads were not liable.

In the case above referred to this court gives careful consideration to the statutes involved and comes to the conclusion that the Commission's construction of the statute was correct. Going further, however, the court points out that even should it have accepted the relators' construction of the pertinent statutes it would not follow that mandamus should issue. The court said:

But even if we should think the statute may be so construed, it does not follow that this court or any other court can require the Commission to decide the question in that way when it has considered the matter and announced that its own judgment is opposed to that interpretation. In that case its interpretation, right or wrong, is the exercise of judgment and discretion—impregnable to mandamus. If what the Commission had done was to refuse to hear the case made by petitioner, or, having heard it, refuse to carry out the plain mandate of the statute, as was the case in *Roberts v. U.S.*, 176 U.S. 221, mandamus would be the proper remedy, but that is not this case, for the Commission did not refuse to hear and to decide; it did both,

and an examination of the provisions relied on clearly may not be said by anyone, when considered in the light of appellants' claims, to disclose a positive command. *Wilbur v. U.S.*, 281 U.S. 206, 218-19. *The mistake appellants make is that they construe the refusal of the Commission to find in the act authority to do the thing appellants pray may be done, as denial of jurisdiction, whereas the fact is the Commission assumed jurisdiction, heard the evidence, and reached the conclusion that on the facts shown no relief could be given under the provisions of the applicable laws.* That this was the construction of a statute is obvious; that the statute from appellants' point of view is not free from doubt is equally obvious; and that action in such circumstances cannot be controlled by mandamus is settled law.

In this view, it follows, without regard to what we may think of the equities, or even whether we would have construed the statute differently, we are without jurisdiction in this proceeding to change the result. The action of the Commission was judicial, and, as the Supreme Court said very recently in a case from us, "errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact." *I.C.C. v. U.S.*, [ex rel Campbell] 289 U.S. 385, 393. [Emphasis ours]

In the case at bar the Commission has declined to award reparation because, upon a full consideration of the facts, it appeared that no provision of the

Interstate Commerce Act had been violated, that the payments involved were made under the Packers and Stock Yards Act for services covered thereby and for which neither by statute or by contract were the railroads liable, and that, therefore, any orders as to these services and payments therefor were outside the scope of the Commission's power, that is to say, its jurisdiction. This amounted to a denial of the prayer of the complaint upon the merits.

The relator's petition should be dismissed and the action of the lower court in so ordering should be affirmed.

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Chief Counsel,

Of Counsel.

SEPTEMBER 1934.

FILED SEP 29 1934

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1934.

No. 6195 Special Calendar.

UNITED STATES OF AMERICA EX REL, THE KROGER GROCERY
& BAKING COMPANY, a corporation, *Appellant*,
vs.
INTERSTATE COMMERCE COMMISSION, *Appellee*.

REPLY BRIEF FOR APPELLANT.

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Dated: September, 1934.
SAMUEL V. MARKLEY,
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In order to set forth more precisely appellant's position in this proceeding, and to answer and demonstrate the unsoundness of arguments and contentions for the first time made by the appellee and which appellant could not anticipate, this reply, as short and concise as is consistent in the circumstances, is made.

I.

APPELLEE CANNOT IMPEACH ITS PUBLISHED REPORT.

At the out-set, the Court's attention is respectfully called to the fact that in several instances in appellee's brief it is intimated that the Commission considered, and perhaps acted on facts not shown in the published report. (See pages 2, 5, 20, 28, 31 and 37) The reference on page 37 of appellee's brief to alleged facts and conditions which Commission had before it when it construed the applicable tariff is pointed out as an example. This statement goes far beyond the facts shown on the face of the report. The report speaks for itself and appellee cannot, we submit, impeach its own report for to allow it to do so would reduce this proceeding to a guessing game. Appellant does not claim that the Commission refused to make certain material findings, which are supported by the evidence, and, according to our understanding, the transcript of evidence has no place in the record in this, a mandamus proceeding. The report, and the ultimate facts therein, are by statute, given a prima facie presumption of correctness and consequently, must stand by themselves. To permit appellee to refer to anything not contained in its published report would result in endless confusion and obviously would make this proceeding impossible. Appellant earnestly contends that on the face of the report, appellee has made a grave error in the application of the law, amounting in fact, to a failure to enforce the Act.

II.

MANDAMUS IS PROPER REMEDY.

1.

Where a Finding is Made That Charges Are Illegal, as Distinguished From Unlawful, Then Reparation is Merely Incidental Thereto, and Entering an Award of Reparation is a Ministerial Duty.

The appellee contends that, irrespective of other considerations, mandamus will not lie herein because an award of reparation involves the exercise of discretion by the Commission and is not subject to control by this Court. Appellant, however, submits that in this case, as in any case where an *illegal* charge is made, there is no discretion vested in the Commission as to ordering reparation.

An overcharge is an *illegal* rate, that is, a rate which is not provided for in a duly filed tariff as provided in Section 6 of the Interstate Commerce Act. Section 6 of the Act makes it the plain duty of the carrier to collect only the published rate and to do otherwise is a crime for which there is serious punishment. An illegal rate or charge can and should be refunded without the consent of the Commission. Consequently, as the Act specifically charges the Commission to excuse and enforce its provision, it obviously follows that an award of reparation is merely *incidental* to a finding that a rate charged was *illegal*. There is a vast difference between an *illegal* rate, such as is here considered, and an *unlawful* rate, which is provided for in a tariff but may be unreasonable, discriminatory, prejudicial, or in violation of the long-and-short-haul clause. The rates considered in the cases cited by appellee (page 44, Appellee's brief) in support of its contention

that reparation is a matter of discretion, such as *Interstate Commerce Commission v. United States, ex rel. Campbell*, 289 U. S. 385 and *Interstate Commerce Commission v. Capital Grain Co.*, 35 F. (2d) 1012, were *unlawful* as distinguished from *illegal* rates, and, it is clear from a study of those cases that reparation does not *necessarily* follow after a finding that a rate was *unlawful*. There lies the obvious and clear distinction between the case at bar and the cases just referred to which are typical of all those cited in support of this contention. On page 45 of its brief, appellee quotes certain language from the Campbell case *supra*, which points out this very distinction when it states that "if the Commission had declined to listen to the claim for reparation, or finding reparation due, had declined to order payment, mandamus might have been available to hold it to its duty." And it so happens that in the case at bar if the Commission had jurisdiction over the charges assailed, reparation will be due because the charges are necessarily *illegal* as they are not provided for in any tariff on file with the Commission.

Appellant is not seeking a review of the Commission's decision but it is seeking the writ of mandamus to compel the Commission to execute and enforce the provisions of the Act. It would seem clear that if the Commission has jurisdiction of the charges assailed, which would mean that the charges were for services connected with the transportation, then, since they were collected without warrant or authority of law in direct violation of section 6 of the Act, the entering of an order of reparation is a mere ministerial duty. In other words, where a charge has been made which is not provided for in a duly published tariff and

where the Commission so finds, there is no alternative or discretion in the matter at all. It must be refunded and, as above noted, it would be a crime to retain it. In order to execute and enforce the law, the Commission could have no discretion in the matter and the statute certainly does not give it.

2.

Mandamus is Appropriate Remedy to Compel Commission to Take Jurisdiction of the Subject Matter in a Proceeding Before It, Where, as in this Case, Failure to Take Jurisdiction Resulted From a Mistake of Law and Constituted a Failure to Enforce the Act.

The appellee also urges, in contending that mandamus will not lie herein, that it took jurisdiction of the complaint, decided the issues and that its action, no matter how erroneous, cannot be corrected by mandamus. With this appellant disagrees.

The subject matter of this dispute are charges for hoof-weighing and services incidental thereto. The Commission did not take jurisdiction of the subject matter and decide some question with respect thereto, but on the contrary the Commission took jurisdiction of the complaint and decided that the subject matter (the charges for hoof-weighing) were not subject to its jurisdiction for the reason that such weighing was not necessary to make *delivery* as provided in Section 15(5) of the Act, and consequently was not part of the interstate transportation involved. In other words, the Commission concluded that the subject matter was beyond the limit of its power, or stated in another way, was not covered by the provisions of the Act.

The Appellant earnestly contends that, in reaching this conclusion, the Commission did so by erroneously declaring the subject matter to be not within its jurisdiction and that, by its erroneous application of the law, the Commission fails and refuses to enforce the provisions of the Act, particularly Sections 6 and 15 (5). And it is well settled that in such a case, the courts may correct such error on a petition for mandamus, where as in this case, the erroneous decision cannot be reviewed on appeal or writ of error. Such is the clear and unmistakable holding by the United States Supreme Court in *United States ex rel Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, quoted in appellant's brief (page 23).

In the instant case, the appellee makes the mistake of assuming that the Commission may use discretion in determining the question as to jurisdiction over the subject matter. In the *Bartlesville Zinc Co.* and *Donner Steel Co.* cases cited on page 41 of appellee's brief the Commission had jurisdiction over the subject matter of the controversy and consequently it could exercise discretion and judgment, which, as pointed out by the Court, would not be disturbed. But, that is a far cry from the case at bar where the question is as to jurisdiction over the subject matter. It seems needless to point out, as the Supreme Court did in *Interstate Commerce Commission v. United States, ex rel Humboldt Steamship Co.*, 224 U. S. 474, that there can be no exercise of discretion in determining jurisdiction.

The Commission has jurisdiction over all services connected with transportation in question. Therefore, as a jurisdictional prerequisite, it is necessary to examine the tariff involved. This is clearly true, because, in order to determine what appellant's rights

and obligations are as to *delivery* it is necessary to look to the only lawful and available source, the applicable tariff. Consequently, if, upon examining the tariff, it is evident that, in order to make *delivery*, the carriers or their agent must weigh the animals, then it is clear that the Commission has jurisdiction over the service of weighing as it is part of the transportation. It is equally clear that, if the Commission has jurisdiction over the weighing, any charge made therefor in addition to the charges provided in the applicable tariff is *illegal*.

Consequently, it is obvious that, in a preliminary consideration of a jurisdictional prerequisite, a mistake of law can be corrected by the courts in a mandamus proceeding. Therefore it is necessary to examine the applicable tariff in order to determine whether in the preliminary consideration, the Commission correctly applied the law.

III.

THE CHARGES ASSAILED WERE ILLEGAL.

1.

Unloading Does Not Constitute Delivery.

Section 15(5) of the Act provides for delivery into *suitable* pens without extra charge. The first question that arises therefore, in the preliminary matter of examining the tariff as a jurisdictional prerequisite, is what constitutes *delivery* for it is not until delivery has been made that the transportation of the stock in question has ended and the stockyard service could begin. It is clear that if the charge made by the stockyard was for a service connected with the transportation, or stated in another way, if the weighing and services

incidental thereto were necessary before *delivery* could be made, then the Commission has jurisdiction of those charges.

It is true that the Commission has held that mere unloading of animals into pens meets the requirements of the statute. Appellee cites the action of the Commission in that respect in the *Southwestern Horse and Mule* case (page 24, Appellee's brief) and in *Hygrade, etc. Corporation* case (page 26, appellee's brief) as authority for the correctness of the holding in the instant case. Our answer to that is that the Commission is in error in those cases as well as in the instant case. But, this Court is in no way bound by the decisions of the Commission. It should be noted, however, that in the cases cited the Commission was not considering a tariff as a jurisdictional prerequisite, and, furthermore they were not considering a particular tariff with respect to the situation. In neither case was it alleged that the charges assailed therein were illegal. The cases cited, even if they were authority, are clearly distinguishable.

Section 6 of the Act requires strict observance of and compliance with the tariff and the United States Supreme Court has many times pointed out the sanctity of tariffs. It is submitted, therefore, that *delivery* can only mean a transfer of the possession of the cattle to the consignee in compliance with the applicable tariff, which has been set out in the record. To hold otherwise is to hold that the tariff can be ignored. That this cannot be done is shown by the *Davis v. Henderson* case (page 15, appellant's brief) wherein the Supreme Court held that the Commission could not even find that a tariff had been "substantially complied with"—let alone ignored.

“Body of Experts” Rule Does Not Apply.

The appellant's rights in this case hinge upon the meaning placed on the tariff because it is to it that one must look to determine whether weighing is necessary to make delivery as used in section 15 (5) of the Act and also as to the legality of the charges. The tariff is set out in the record.

In order to sustain its finding that these charges were not subject to its jurisdiction, the appellee found it necessary to hold that under the tariff appellants were not entitled to weighing free of charge. This was necessary because a finding that the charges assailed were subject to its jurisdiction would mean that they were *illegal* because not named in any tariff on file with the Commission. The appellee now urges that this Court cannot disturb the finding because the Commission acted as a “body of experts” in placing the interpretation on the tariff. Appellant contends that this rule has no application in the present instance.

The appellee refers to *Standard Oil Co. v. United States*, 283 U. S. 235, and quotes passages therefrom in support of its contention that it acted as a body of experts in interpreting the tariff. By coincidence, appellant cites the same case to show that the rule does not apply.

It must be assumed that the Supreme Court meant that when a *bona fide* instance the tariff involved contained language peculiar to railroading or words having a technical meaning or use, understood *best* or *properly* by “experts”, then in the interest of uniformity, an interpretation by the Commission would not be disturbed by the Court. However, it is equally true, and it also must be taken for granted, that the

Supreme Court meant what it said that when only *simple, ordinary, and everyday* words, having no peculiarities by usage in the trade, are used in a tariff, then that tariff will be considered like any other document in dispute.

Clearly the Court did not say, and it did not lay down as the law, that the Commission could take any given tariff, no matter how simple, clear and plain, and by merely *saying* that it contained words and phrases having a technical meaning, and thereby make it susceptible only to expert interpretation. If the Commission could do that, then it could nullify the law and defeat the clear ends of justice by preventing a court from passing on the tariff. Whether a tariff contains words or phrases which have a peculiar or technical meaning, which when applied to matters of transportation have a meaning different from that usually understood, is a matter of fact to be ascertained from reading the tariff in question. Let us examine it, and while doing so remember that this tariff is the contract of carriage between the consignee and the carrier, that it must be strictly complied with by all parties, and that it is to this tariff that the shippers must turn for information and guidance. Their rights and obligations are fixed by it and the courts have said many times that they are not nets in which to entrap shippers. In other words, when a shipper reads something in a tariff he is entitled to take it at its face value.

Rule 16(b) of the tariff provides that "where proper facilities are provided at destination for obtaining hoof-weights, the weights so obtained, after the stock has been fed and watered, will be the proper basis for assessing freight charges". This provision is of the

utmost importance to appellant for on it our rights depend. It is, as an examination will disclose, one of the principal items of the tariff and not merely an isolated clause as appellee, in its effort to minimize our claim, would suggest. If Rule 16 (b) is taken at its face and means what we contend any shipper or consignee would understand it to mean, then appellant is entitled to have shipments weighed at Cincinnati without extra charge for such service. But, appellee says that the words used in Rule 16 (b) are technical and so fraught with transportation peculiarities that they do not mean what the ordinary person would ordinarily understand them to mean and consequently they need interpretation by experts. And appellee further says that not only are the words peculiar to transportation, but the extrinsic circumstances make hoof-weighing unnecessary, notwithstanding the fact that proper facilities are available. In this connection, appellant desires to forcefully point out that, on page 31 and again on page 37 of its brief, appellee asserts that the Commission, in construing the tariff, considered "surrounding circumstances and conditions" (page 31) and "numerous pertinent facts, including the history of the stockyards and their practices, their relations with the railroads, the absorption of service charges and the actions and attitudes of shippers, and carriers in relation thereto," (page 37). The appellant respectfully calls the Court's attention that obviously these were not the facts. The appellee's statements are answered by its own report. The report clearly and plainly shows that the construction as to weighing was not an "expert ruling" made after consideration of extrinsic facts. It was a construction made from a "consideration of the various provisions

of the tariff relative to weighing'' (R. 34)—and nothing else. Clearly appellee is precluded by its own report from establishing a case which falls within the scope of those cases, wherein the Courts have held that they would not disturb the findings of the Commission with respect to a tariff, because either the words in the tariff were used in a peculiar meaning or that there was need to resort to extrinsic evidence in order to determine a usage of trade. However, in the instant case, although the report does not indicate any peculiarity of meaning with respect to the words used in the tariff or that any extrinsic facts were considered, the appellee in its brief argues that both conditions were present, and that, therefore, its construction should stand.

The appellant believes and insists that this case should be controlled by the reasoning used in *Great Northern Railway Co. v. Merchants Elevator Company*, 259 U. S. 286. In that case the Court had before it a question growing out of the collection by the carrier of a reconsignment charge of \$5.00 a car for sixteen cars of corn, under Rule 10 of its tariff, shipped from points in Iowa and Nebraska to Willmar, Minnesota, and after inspection there rebilled to Anoka, a station beyond. The tariff rate from points of origin via Willmar to Anoka were the same as to Willmar. Willmar had been named as destination in the original bill of lading, only because it is the place at which grain coming into the State by this route is inspected and graded under the laws of Minnesota and of the United States, and the carrier knew or should have known that fact. Immediately after inspection, disposition orders were given and the original bills of lading were surrendered in exchange for billing to Anoka. Rule 10 read:

“Diversion or reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned, or reforwarded on orders placed with the local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading * * * a charge of \$5.00 per car will be made if car is diverted, reconsigned or reforwarded, to a point outside of switching limits of original destination.”

The shipper contended that the case was within the exception known as Exception (a), as amended by Supplement One, which provided that rules, including Rule 10, shall not apply to:

“(A) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at a point *intermediate* thereto.”

The tariff containing the rule under which the \$5 charge was made was the only governing tariff. It had been duly filed with the Commission. The validity of the tariff, including the rule and exception, was admitted. And there was no dispute as to the facts. With respect to this situation the Court stated:

“In the case at bar the situation is entirely different from that presented in the *American Tie & Timber Co.* case, or in the *Loomis* case. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of the words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts.
* * *

Before making that statement the Court had considered tariffs from several different angles, such as, when the words used are peculiar, when there is occasion to resort to extrinsic evidence, and when there is a dispute whether words in a tariff were used in an ordinary or peculiar meaning, and thus, the case is particularly pertinent in solving the question here presented.

It should be noted that in the instant case there is no dispute as to facts in the report and the report indicates no existing differences as to any facts. The tariff is not questioned as to validity, and, as before pointed out, there is nothing to indicate that the words are used in a peculiar meaning. Consequently, it would appear that here, too, all that is necessary to be done is to apply the tariff to the facts after the meaning of the words in their ordinary sense has been determined. That, appellant contends, would dispose of this controversy.

The appellee, however, refers to the *Adams v. Mills* case (page 35 its brief)and points to the statement that "whether unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs" and to the further statement as to the necessity of determining certain facts. Then, appellee apparently assumes that those statements conclude the present case.

In the first place, it will be noted that the decision in the *Adams v. Mills* case was that unloading was part of transportation, and the statements referred to were merely used by way of dictum. By analogy it can be argued that surely weighing is also part of transportation. However, a study of the *entire* case discloses a complicated tariff situation, which from reading the

report is difficult to grasp as both the carrier and the stockyard companies had published and filed tariffs with the Interstate Commerce Commission with respect to the unloading of animals at Chicago. These tariffs were in conflict as to unloading and in view of that fact the learned Court said that it was necessary *in that case* to look beyond the tariffs and find out what had been done in the past with respect to certain practices at Chicago. The situation, as disclosed by the report in this case, is entirely different from the case at bar. Here we are not faced with conflicting tariffs as to weighing. It will be further noted that the Supreme Court cited for comparative purposes the *Great Northern and Merchants Elevator* case which, it is submitted, indicates the soundness of the later. Appellant, therefore, contends that the *Adams v. Mills* case has no bearing on the issue here, and it again might be pointed out that in the instant case the Commission did not even intimate in its report that it resorted to any extrinsic evidence.

It would seem apparent, in view of the foregoing arguments, that this tariff should and must be construed as a pure question of law.

3.

Tariff Must Be Construed Same as Any Other Document.

The appellant urges that the tariff provision is so plain, clear, and free from ambiguity that it is only necessary to take what it obviously means on its face. As before stated, Rule 16 (b) is the crux of the case, and it should be constantly borne in mind that a jurisdictional prerequisite is being considered.

Proper facilities for obtaining hoof weights are available and clearly Rule 16 (b) provides that, under that condition, the charges should be collected on that basis. But, the appellee contends, Rule 16 (b) does not *expressly declare* that the stock *must* be weighed, and, in order to bolster up that statement says that consideration must be given to other provisions of the tariff. The Commission had no right to and did not resort to extrinsic facts or circumstances as they are not needed to make clear an already unambiguous meaning. Rule 16 (b) is perfectly clear and therefore is not susceptible of interpretation, but, even assume that it were, then the ordinary rules of law, such as resolving all doubts and ambiguities in favor of the shipper, must be followed. These rules of construction have already been referred to in appellant's motion for reconsideration and are too well known to call for discussion.

The tariff clearly was intended to cover three different situations, the first being a place like Cincinnati where stockyards and facilities for weighing were provided, the second a place without a stockyard where track scales were provided, and third a place where neither stockyard or track-scale facilities were available. In the last it was necessary, of course, to use the minimum carload weights.

It should be noted in examining this tariff that although it is the "applicable" tariff, the entire document is not in dispute here, nor was it considered by the Commission, as the report clearly states that only the *weighing* provisions were considered. This is especially pertinent because Appellee points out in its brief that it considered the "four corners" of the tariff and indicates also that it might have considered other

tariffs not of record. This, as we have previously pointed out, is highly improper. Surely, appellee can not here refer to things not shown in the report. We earnestly contend, therefore, that the inquiry here is limited solely to an ordinary legal interpretation of the weighing provisions of the tariff in this record. And this inquiry, we have shown can only result in a finding that, under ordinary rules of law, Rule 16 (b) is mandatory as to weighing at Cincinnati.

4.

The Unloading Pens Were Not, as a Matter of Law, Suitable.

In addition to the question of delivery as imposed by the statute, Section 15(5) requires that the pens be *suitable*. In other words, *legal delivery*, which we contend has been shown not to have been made because the tariff was not complied with, must be made into suitable pens. It is appellant's position that, as a matter of law, upon the facts shown in the report, the pens were not and could not be suitable. Appellant's contention is precisely set out in Commissioner Eastman's dissenting opinion (R. 36) and need not be enlarged on.

However, appellant wishes again to point out some misstatements of fact in appellee's brief with respect to the facts shown in the report, because, as this is purely a question of the application of the statute to the facts, it is especially important. It will be noted that on page 24 of its brief appellee states that "the Commission made the finding that the unloading pens were suitable, with the evidence taken at a 'full hearing' before it." However, the Commission did not make such an affirmative finding, but, on the contrary as the report shows, stated that "the record does not show

that these pens are not suitable for unloading purposes, and there is no contention that the way of egress is unfit." (R. 30) After describing the physical characteristics of the pens and the procedure taken with respect to the stock, this negative finding was made. This finding, it is asserted, is wrong as a matter of law, in view of the facts stated about the pens. In other words, the pens, as described, fail to meet the statutory test because, as Mr. Eastman points out, no pen is suitable unless it permits of a reasonable opportunity to take delivery and remove the stock from the premises after notice of arrival.

Appellee urges, however, that consignees could take their stock directly from the unloading pens and that it does not matter whether the stock was taken from the unloading pens to holding pens. The answer to that contention is, appellant states, that legal delivery could not be made from the unloading pens because the tariff did not provide for it.

5.

Removal From Unloading Pens Did Not Constitute Delivery.

In its brief (page 37) the appellee takes the position that, when the stock is taken from the unloading pens by the stockyard employees, the employees act as agent of the consignee. The appellee bases this argument on the theory that the shipments were "offered" to consignee at the unloading pens.

This takes us back to the question of tariff interpretation which has heretofore been fully discussed. It is appellant's position that, pursuant to the tariff, the stock *had* to be weighed, and consequently, the stock

could not be *delivered* from the unloading pens. It would be illegal to turn over the stock at that time because the tariff provided for a different manner and method of delivery and the tariff must be strictly complied with.

IV.

CONCLUSION.

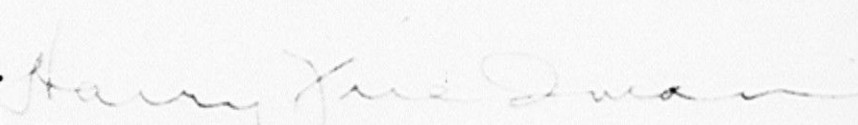
In concluding its brief, appellee cited three instances in which a court of last resort approved the issuance of a writ of mandamus. *Interstate Commerce Commission v. Humbolt Steamship Co.*, 224 U. S. 474; *United States ex rel Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, and *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission*, 252 U. S. 178. The appellant has also cited these cases and attempted to point out that they are clearly authority for the issuance of the writ in the instant case.

The two recent cases cited by appellee are not in point and have no bearing on the question presented in the case at bar. In the *Arcata & Mad River* case (appellee's brief, page 49) it is clear that the holding of the court was that the Commission had jurisdiction over the merits or subject matter in dispute and consequently mandamus would act as a review. In the *Chicago Great Western* case (page 52 appellee's brief) the holding of the court is clear to the point that the Commission took jurisdiction of the complaint and decided that it did not have legislative authority to do the thing requested. That is different from the instant case. As before pointed out in the instant case, the Commission took jurisdiction of the complaint and

then decided that the service rendered was not transportation and hence not subject to the Act. But, the authority was there and *could* and *should* have been exercised had not the Commission made a mistake of law in the preliminary determination with respect to the tariff.

It is respectfully submitted that this Court should reverse the action of the lower court and order the writ of mandamus to issue.

Dated: September, 1934.


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